STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| RACINE EDUCATION ASSOCIATION,<br>Complainant,<br>vs.<br>RACINE UNIFIED SCHOOL DISTRICT,<br>Respondent. | Case 78<br>No. 31940 MP-1498<br>Decision No. 20941-B |

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.

ORDER DENYING PRELIMINARY MOTIONS, AFFIRMING EXAMINER'S FINDINGS OF FACT, MODIFYING EXAMINER'S CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Lionel Crowley having issued his findings, conclusions and order in the above matter on May 3, 1984, wherein he dismissed the complaint based on his conclusions that the Respondent 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.; and on May 18, 1984, Complainant having timely filed a petition for Commission review of that decision; and on May 29, 1984, Respondent having filed a motion to dismiss said petition on the basis that said petition does not set forth Complainant's grounds of dissatisfaction with the Examiner's decision; and Complainant having filed its initial brief to the Commission on June 27, 1984; and on June 28, 1984, Respondent having filed a motion to dismiss the petition on account of Complainant's failure to send a copy of its brief to Respondent's Counsel; and on July 26, 1984, Respondent having filed its brief to the Commission in the matter; and no further arguments having been filed prior to the (postmarked) August 8 deadline for same; and the Commission having considered the Examiner's decision, the record, and the written arguments, and being fully advised in the premises, and being satisfied that the Respondents' preliminary motions should be denied, that the Examiner's Findings of Fact should be affirmed, that the Examiner's Conclusion of Law should be modified and that the Examiner's Order should be affirmed;

NOW, THEREFORE, it is hereby

ORDERED 1/

B. That the Examiner's Findings of Fact shall be and hereby are affirmed and adopted as the Commission's.

(Footnote 1 continued)

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aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate. (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

C. That the Examiner's Conclusion of Law shall be and hereby is modified as follows and, as modified, adopted as the Commission's:

MODIFIED CONCLUSIONS OF LAW

1. That Respondent, Racine Unified School District, has not been shown to have committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., by its conduct in relation to the document initialed by the parties' representatives on June 10, 1983.

2. That the question of whether the Respondent committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by violating the terms of a collective bargaining agreement has neither been raised in the pleadings nor otherwise been made an issue that may properly be adjudicated herein without contravening due process principles of fair play.

D. That the Examiner's Order dismissing the complaint shall be and hereby is affirmed and adopted as the Commission's.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION 2/

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

2/ Chairman Torosian did not participate in this decision.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER DENYING PRELIMINARY MOTIONS,
AFFIRMING EXAMINER'S FINDINGS OF FACT,
MODIFYING EXAMINER'S CONCLUSION OF LAW
AND AFFIRMING EXAMINER'S ORDER

BACKGROUND

In the complaint initiating this proceeding, the Association alleged the following as the complained of prohibited practice(s) involved and relief requested:

> 3. The employer violated Section 111.70(3)(a)4., Wis. Stats., by refusing to honor one provision of the tentative agreements reached between the parties on June 10, 1983. The employer evinced its intent to pay interest on retroactive salaries, as evidenced by Exhibit A, attached hereto and incorporated herein, a document which is further entitled "PROFESSIONAL COMPENSATION" which contains the interest amounts in the applicable salary lanes and steps, and which is initialed by Frank Johnson, attorney and chief negotiator for the employer an individual in whom apparent and/or actual authority to bind the employer, was vested.
>
> The fact that all tentative agreements were intended to be part of a final labor agreement, including the interest payments, is evidenced by the fact that at least a portion of such payments have been made to the teachers covered by the bargaining agreement, and by the fact that all proposals regarding professional compensation (except those affecting the level of salaries in the third year) were withdrawn from the parties' final offers.
>
> Upon information and belief, the Racine Unified School Board, on or about June 25, 1983, expressly rejected the theory of interest payments. This has resulted in the loss of professional compensation to teachers who have had the payments listed in Exhibit A lumped into their overall retroactive salary payments, with consequent deductions made therefrom. The Racine Education Association was misled into believing that an agreement incorporating the theory of lump sum "one-shot" "interest" payments had been reached on June 10, 1983 and that only formal execution via school board action remained, in violation of Section 111.70(3)(a)4., Wis. Stats., adopting sec. 8(a)(5) of the N.L.R.A. and the principles set forth in NLRB v. Mayes Bros. Inc., 383 F.2d 242 (5th Circuit, 1967); NLRB v. Advanced Business Forms Corp. (1973, CA2) 474 F.2d 457; Cutter Laboratories, Inc. (1982) 265 NLRB No. 78, 112 BNA LRRM 1026, 1982-83 CCH NLRB Paragraph 15441; Wisdom Industries, Inc. (1981) 257 NLRB No. 164, 108 BNA LRRM 1070, 1981-82 CCH NLRB Paragraph 18440; Buffalo Bituminous Inc. v. NLRB (1977, CA 8) 564 F.2d 267.
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> WHEREFORE, the Racine Education Association respectfully requests the following remedial relief from the Wisconsin Employment Relations Commission:
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> 1. An order from the commission directed to the respondent requiring it to cease and desist from the prohibited practices delineated above;
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> 2. An order requiring the respondent to make up any losses resulting from the deductions caused by the employer's system of lumping the

separate interest checks in with other retroactive salary payments made to individual teachers;

3. An order requiring the employer to honor the agreement signed by the parties' collective bargaining representatives on June 10, 1983;

4. Such further relief as the Commission deems just and equitable.

The District answered at the hearing, denying paragraph 3 of the Complaint except admitting that the Exhibit A attached to the Complaint was "a true and correct copy of what it purports to be."

Neither party chose to make an opening statement at the hearing when offered the opportunity to do so by the Examiner, and there were no closing arguments except those presented by means of the parties' post-hearing briefs.

THE EXAMINER'S DECISION

The Examiner described the Association's arguments to him as centering either on the District's alleged refusal to execute and implement an agreement to pay interest or on the District's alleged misleading of the Association into believing such an agreement had been reached.

The Examiner concluded that the record evidence does not establish that the District ever refused to sign an agreement. The Examiner concluded that both parties, on June 10, 1983, initialed a document setting forth a tentative agreement by the parties. The Examiner found no evidence that the Association requested the District to sign any other document, or that the Association requested any changes in the initialed document of June 10, 1983. The Examiner concluded that the initialed document embodied the parties' agreement of that date and that the District's representative, Frank Johnson, had initialed the document on June 10, 1983, and that the District thereafter ratified same on June 29, 1983.

The Examiner concluded that the Association's contention that the June 10, 1983, document required the District to pay interest on certain funds rested essentially on the Association's interpretation of the document in the context of its bargaining history. Noting that the Association did not plead a violation of Sec. 111.70(3)(a)5, Stats., the Examiner concluded that he could not, in the circumstances, address the issue of whether or not the District violated the agreement embodied in that document.

Rather, the Examiner essentially undertook an analysis of the evidence to determine whether the totality of the District's conduct in relation to the June 10 document amounted to bad faith bargaining. In that regard the Examiner stated that, to be evidence of bad faith bargaining, an alleged failure to comply with the terms of the June 10 agreement would have to involve a showing "that the terms of the agreement are so clear that the District's interpretation amounts to a bad faith refusal to implement them."

The Examiner concluded that the June 10, 1983, agreement was "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." Noting additionally that "items on which tentative agreement has been reached during negotiations normally do not become enforceable provisions

In its supporting brief, the Association contends that alleged violations of both Sec. 111.70(3)(a)4, Stats., and of Sec. 111.70(3)(a)5, Stats., are properly before the Commission, and that the Examiner's refusal to consider any alleged violation of Sec. 111.70(3)(a)5, Stats., was "bad precedent for the reason that complainants will be forced in the future to cite all sections of 111.70, plead inclusively and generally, or to file numerous actions." The Association further argues that although the Examiner properly defined the issue for decision regarding the alleged Sec. 111.70(3)(a)4, Stats., violation, the Examiner drew the wrong conclusion when he determined that the June 10, 1983, agreement was not a plain and unambiguous agreement by which the District's chief negotiator agreed to a proposal providing for interest payments. Finally, the Association argues that a conclusion that the District Board had committed a prohibited practice is also warranted by the fact that "The Board obviously did not ratify the agreement reached between Frank Johnson and the REA."

In its brief opposing the petition for review, the District contends that the petition for review should be dismissed because the Association has failed to state a ground for dissatisfaction with the Examiner's decision in violation of Commission Rule ERB 12.09(2) Wis. Adm. Code. If the Commission reaches the merits of the petition for review, the District argues that the evidence demonstrates that it bargained in good faith with the Association in all respects. The District argues that the Association accepted a District proposal on June 10, 1983, entitled "Professional Compensation" in the context of previous Association insistence on various "interest" proposals. Since the parties never discussed face-to-face the question of whether the amounts listed on the document initialed on June 10, 1983, would be subject to customary deductions taken from professional compensation, the District asserts that the only possible conclusions are either that the District fully complied with the terms of the document or that there was a mutual mistake at the time the document was signed. In either event, the District argues, no bad faith bargaining on the District's part can be found in the circumstances. The District argues that it did not refuse to ratify the terms of the June 10, 1983, document; but it argues that, even if it had, such would not constitute an unlawful refusal to execute an agreement since the June 10, 1983, agreement was subject to mutual ratification by the Association membership and the District School Board.

In any event, the District argues that the June 10, 1983, document is ambiguous and its interpretation must be resolved through arbitration or through a prohibited practice forum. Because the Association did not plead a violation of Sec. 111.70(3)(a)5, Stats., the District argues that no issue involving that statutory provision was properly before the Examiner and hence none can be considered properly before the Commission herein. Even if a Sec. 111.70(3)(a)5, Stats., violation-of-agreement claim were somehow deemed properly before the Commission, the District argues that the evidence does not support a conclusion that the District breached the June 10, 1983, agreement since the language and the format of that document do not support the Association's contentions that the document constitutes a commitment to pay interest as opposed to additional professional compensation.

## DISCUSSION

### Respondent's Preliminary Motions for Dismissal

We have denied Respondent's preliminary motions for dismissal. While Complainant's petition for review does not comply with the provisions of Commission Rule ERB 12.09(2) requiring that the petition "shall briefly state the grounds for dissatisfaction with" the Examiner's decision, Respondent has not, in the circumstances, shown that it has been prejudiced by that deficiency in Complainant's pleading. The briefing schedule permitted the Respondent to know the bases of Complainant's dissatisfaction with the Examiner's Findings, Conclusions and Order before Respondent was called upon to state its position concerning the petition. Accordingly, we find it appropriate to waive the requirements of 12.09(2) herein. See, ERB 10.01 ("The commission . . . may waive any requirements of these rules unless a party shows prejudice thereby"); Cooperative Education Service Agency No. 4, Dec. No. 13100-G (WERC, 5/78); and School Board of Wauwatosa Public Schools, Dec. No. 14985-B (WERC, 9/78). Accordingly, we have denied the Respondent's May 29 motion to dismiss.

Similarily, while Complainant did not strictly comply with the briefing arrangements established by the Commission (in that Complainant failed to simultaneously serve Respondent's Counsel with a copy of its brief to the Commission), the Respondent was not prejudiced by that procedural deficiency in that it was promptly provided with a copy by the Commission and was granted additional time within which to file its brief. The original briefing schedule was set by letter from Commission General Counsel Peter Davis to counsel for each party on June 1, 1984. That letter set a deadline for the submission of each brief and directed the parties to send a copy of their brief to the Commission and the opposing party. The Association responded in a cover letter dated June 25, 1984, enclosing a copy and the original of its brief directly to the Commission. Then, in a letter received at the Commission offices on June 28, 1984, the District moved for dismissal of the petition for review or, in the alternative, for an extension of time "equal to the time between June 26 and the date I receive your brief, within which to file the District's brief." Also on June 28, 1984, the Commission caused a copy of the Association's brief to be hand delivered to the office of the District's Counsel, and General Counsel Davis sent a letter to Respondent's counsel extending the briefing schedule. In the circumstances we find that waiver of this minor procedural noncompliance on Complainant's part would not prejudice Respondent. Accordingly, we have also denied the Respondent's June 28 motion to dismiss.

## Availability of Sec. 111.70(3)(a)5 Claim

We agree with the Examiner and Respondent that no claim that the Respondent violated Sec. 111.70(3)(a)5, Stats., may be adjudicated herein. Only a Sec. 111.70(3)(a)4, Stats. violation is mentioned in the Complaint. As a result there was no reference in Respondent's answer to a Sec. 111.70(3)(a)5, Stats., violation-of-agreement claim. There was no opening statement or other hearing developments that made plain the Complainant's intention to pursue a violation-of-agreement theory. Even the references to such a theory by the Complainant in its post-hearing brief to the Examiner were indirect and nowhere expressly mentioned Sec. 111.70(3)(a)5, Stats. Respondent's brief to the Examiner unequivocally asserted Respondent's understanding that no claim under Sec. 111.70(3)(a)5, Stats. was properly before the Examiner. This is not a case in which the Respondent had reason to know at any point during the hearing that a violation-of-agreement claim was being advanced. For the foregoing reasons, it would contravene the principles of fair play and due process to allow the Association to pursue relief on the basis of that additional claim. See, General Electric v. WERB, 3 Wis.2d 227, 243 (1958). We have added a Conclusion of Law to that effect.

## Alleged Violation of Sec. 111.70(3)(a)4, Stats.

We share the Examiner's conclusion that Complainant has not proven a violation of Sec. 111.70(3)(a)4, Stats. We have reworded the Examiner's Conclusion of Law to state that conclusion generally while at the same time avoiding any possible implication that we are deciding whether the Respondent is or is not complying with the terms of the document initialed by the parties' representatives on June 10, 1983. 3/

We agree with the Examiner that Respondent has not been shown to have refused to execute (i.e., refused to sign) an agreement previously agreed upon between the parties. Representatives of both parties initialed the June 10 document, and there is no evidence of a request that Respondent sign any document or, therefore, that Respondent ever refused such a request.

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3/ The Examiner's Conclusion of Law read as follows:

> "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."

The Examiner's reasoning also leads us to conclude that the totality of Respondent's conduct has not been shown to constitute bad faith bargaining. 4/ In its Brief (at p. 4), the Complainant argues that the Examiner erred by not concluding that the initialed document clearly and unambiguously provides for one-time payments of interest rather than of additional compensation. Thus, Complainant argues, the Examiner's own rationale should have resulted in the conclusion that the Respondent was engaging in bad faith bargaining by implementing some other interpretation than the clear and unambiguous meaning of the document.

We agree, instead, with the Examiner that the language of the initialed document can be read to support either the District's or the Association's interpretation. The document initialed by the parties is titled "Professional Compensation" but subtitled "interest". It calls for payments "for interest" which could mean "constituting interest" but could also mean "in place of interest". The Association had previously proposed language that clearly described the one-time payments it was proposing as interest but the District was unwilling to agree to those proposals and the parties ultimately agreed upon terms which were not nearly so clear as the Association's had been. The figures on the June 10 document were calculated in the same manner as compensation is calculated on salary schedules generally, whereas the one-time payment schedules proposed by the Association had been calculated on different and more complex formula designed to generate an amount that would approximate interest on differences between what was paid and what the Association believes should have been paid by the District during certain periods of time. These factors, combined with the absence of any other obviously overriding indicator of intended meaning (e.g., communication by either party as to whether the customary deductions taken from compensation payments were to be taken from the agreed-upon one-time payments), support the Examiner's conclusion that the District's ratification and of implementation of its interpretation of the June 10 document is not evidence of bad faith bargaining on the District's part.

It is, of course, entirely possible that the parties' respective understandings about the meaning of the language initialed on June 10 have differed from the start. Ambiguities in agreed-upon language are sometimes resolved to the surprise of one of the parties involved. Such a development does not necessarily indicate that one of the parties was bargaining in bad faith. The refusal to bargain cases cited by the Union involved situations in which a party refused to sign an agreement setting forth prior commitments to which it had either unconditionally agreed or had led the other party to believe it had unconditionally agreed. 5/ Here we are dealing instead with a situation in which there is merely a difference of opinion over what the June 10 document means.

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4/ The Examiner (at p. 7) cited Ozaukee County, Dec. No. 18384-A (Knudson, 7/81), aff'd by operation of law, Dec. No. 18384-B (WERC, 8/81) for the proposition that "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." He followed that citation by noting that "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." We do not find it necessary to make those comments or to make that citation part of our rationale herein, and we have not done so.

5/ The cases relied upon by the Union were those set forth in the portion of its complaint quoted under BACKGROUND, above, i.e., Cutter Laboratories, 256 NLRB No. 78, 1982-83 CCH NLRB Par. 15,441 (1982); Wisdom Industries, Inc., 257 NLRB No. 164, 1981-82 CCH NLRB Par. 18,440 (1981); NLRB v. Mayes Bros., Inc., 383 F.2d 242, 56 CCH LC Par. 12,136 (CA5, 1967); NLRB v. Advanced Business Forms, Corp., 474 F.2d 457, 70 CCH LC Par. 13,334 (CA2, 1973); and Buffalo Bituminous, Inc., 564 F.2d 267, 96 LRRM 2884 (CA8, 1977). Notably, in the Cutter Laboratories case, the Board specifically distinguished ". . . this case (where) there is no ambiguity about the parties' intention . . ." from cases relied upon by the Administrative Law Judge wherein ". . . the critical language itself was on its face ambiguous."

In sum, we have no occasion herein to offer an opinion as to which of the competing interpretations of the June 10 document is the more persuasive, but we are satisfied that the Complainant has not shown that Respondent's conduct in relation to the June 10 document constituted bad faith bargaining or any other refusal to bargain conduct prohibited by Sec. 111.70(3)(a)4, Stats.

Accordingly, we have affirmed the Examiner's order dismissing the Complaint in its entirety.

Dated at Madison, Wisconsin this 11th day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION 6/

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

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6/ Chairman Torosian did not participate in this decision.