STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case 88 No. 34044 MP-1644 Decision No. 22263-A

Appearances:

Mr. Robert K. Weber, Schwartz, Weber, Tofte and Nielsen, Attorneys at Law, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Racine Education Association, referred to below as the REA.

Mr. Frank L. Johnson, Director of Employee Relations, Racine Unified School District, 2220 Northwestern Avenue, Racine, Wisconsin 53406, appearing on behalf of the Racine School District, referred to below as the District.

ORDER DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

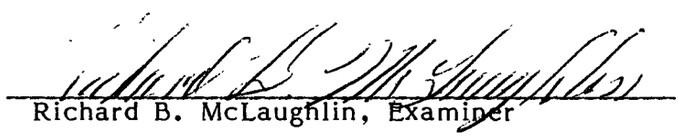
The REA filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on October 31, 1984, in which the REA alleged that the District had committed prohibited practices within the meaning of Secs. 111.70(2) and (3)(a)1 and 5, Stats. The parties attempted, without success, to settle the matter without need of a formal hearing, and the Commission, on January 11, 1985, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner in the matter. With the consent of the parties, hearing on the matter was scheduled for February 26, 1985. On February 4, 1985, the District filed an answer which included a motion to dismiss the complaint or in the alternative to defer the complaint to grievance arbitration. Each party requested a ruling on the motions prior to hearing and the February 26, 1985, hearing was postponed pending a ruling on the motions. The parties submitted written briefs and supporting documents by March 20, 1985.

ORDER

The complaint filed by the REA on October 31, 1984, is deferred to grievance arbitration with the Examiner retaining jurisdiction over the matter to insure that the issues raised by the complaint are resolved and, if appropriate, adequately remedied by arbitration.

Dated at Madison, Wisconsin this 24th day of April, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER
DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

BACKGROUND

The REA's complaint consists of four separately numbered paragraphs. The District's answer admits the first two paragraphs and denies the last two. 1/ The last two paragraphs of the complaint state:

> 3. The employer violated Sections 111.70(2), (3)(a) 1. and 5., Stats., by refusing to honor certain provisions of the collective bargaining agreement between the parties which expired on August 25, 1982, but which were thereafter implemented by the employer, including Article VII, Section 3, Level Three b. and c.
>
> 4. The employer has established a pattern of delaying the processing of grievances until the end of the time limits set forth in the implemented work rules, thus inhibiting timely resolution of labor disputes. The Racine Education Association, in an effort to expedite the process, formally notified the District of the problem and explicitly requested a timely meeting on four specific grievances at the Board level. A copy of said notification is affixed hereto and incorporated herein as Exhibit "A". The District responded by ignoring the request and failing to meet the guidelines set out in its own implemented work rules. Such action interferes with the Association's ability to effectively administer the "contract" and to fairly represent its members.
>
> WHEREFORE, the Racine Education Association respectfully requests the following remedial relief from the Wisconsin Employment Relations Commission:
>
> 1. An order from the Commission directed to the Respondent requiring Respondent to cease and desist from the prohibited practices delineated above;
>
> 2. An order requiring the Respondent to honor the timeliness of the implemented work rules;
>
> 3. Such further relief as the Commission deems just and equitable.

Exhibit A, referred to in paragraph 4 of the complaint, states:

> Notification is hereby given to you by the Racine Education Association that the following grievances are being forwarded to Level III for Board action according to Article VII, Section 3, Level Three, b of the "Professional Agreement between the Racine Education Association and the Racine Unified School District, August 25, 1979 - August 24, 1982".
>
> #23-61-84 No Substitute Provided (Case-Dominak)
> #23-97-84 Assigned Class During Prep Time (Goodland-C.Millard)
> #23-99-84 Individual Bargained Payment (Park-Thompson)
> #23-4-85 Procedure, Re: Ortmayer Grievance

1/ The District's answer to paragraph 4 specifically states: "Admits that the District received a copy of the letter marked Exhibit 'A', but denies any other allegations or conclusions contained in paragraph 4 or Exhibit 'A' of the Complaint."

> Your Level I administrators and the Superintendent's designee have been holding formal grievances until the end of the timelines established in the grievance procedure. The 10 days at Level I, 10 days at Level II meeting and 15 days for a Level II response represent a minimum of seven weeks before a hearing can be requested with the Board. The grievance procedure is supposed to be an orderly, speedy procedure for grievance processing whether a resolution is forthcoming or not.
>
> Accordingly, we are expecting to meet with the Board at Level III within the timelines of the grievance procedure per Article VII, Level Three, c. Please notify the Racine Education Association of the time of the Level III meeting for the above forwarded grievances. 2/

The District's answer contained two affirmative defenses which the District elaborated on in its motions. Accompanying the District's answer and motions was a supporting affidavit filed by Johnson which, among other things, alleged:

> 2. That as Attorney and Director of Employee Relations I have the authority to waive any procedural defects that may occur from the utilization by the Racine Education Association of the grievance procedure.
>
> 3. That for purposes of the present Motion to Dismiss, I do hereby waive any procedural defect which would prevent the Racine Education Association from adjudicating in arbitration the alleged violation of the implemented working conditions on its merits.

THE PARTIES' POSITIONS

In its brief accompanied by a second affidavit, the District notes that the standard governing alleged violations of Sec. 111.70(3)(a)1, Stats., requires that "the conduct complained of must be likely to coerce or intimidate the employes in the exercise of their rights under the act." The District argues that its conduct in the present matter cannot be considered to have violated this standard. The District asserts that the complained of conduct consists of "no more than the fact that during the third step of the grievance procedure, the Negotiating Committee met, seven days beyond the ten days stated to consider the grievance." According to the District, even if the Negotiating Committee had not met at all or had refused to meet, no employes' rights could have been violated since the grievance procedure provides for arbitration. Arguing in its second affidavit that the REA demanded arbitration of the four grievances, that the REA requested a panel of arbitrators from the Commission, that the parties did select arbitrators to hear the four grievances, and that the REA has not yet made any attempt to schedule the four grievances for arbitration, the District concludes that there is no merit to the REA's allegations that the District has somehow violated Sec. 111.70(3)(a)1, Stats. In addition, the District urges that any contractual violation by the District, if proven, "could not be considered likely to coerce or intimidate any employes in the exercise of their rights under the act . . . (since) the complaint alleges a technical de minimus time violation which did not prevent the grievant from meeting at the third step or having the grievance resolved by arbitration at the fourth step if the REA so chooses." In sum, according to the District, the Association's complaint lacks merit. In the alternative, the

---

2/ Article 7, Level Three b. and c. states:

> b. Within five (5) school days after receiving the written grievance, the Association may refer it to the Board or a designated subcommittee of Board members (hereinafter in this Article where the title Board appears, subcommittee may be substituted therefor) if the Association determines that the grievance is meritorious.
>
> c. Within ten (10) school days after receiving the written grievance, the Board will meet with the aggrieved teacher and the Association representative for the purpose of resolving the grievance.

District urges that the complaint be deferred to grievance arbitration. Such a deferral, according to the District, is supported by Commission case law and is, in any event, consistent with the language of Article 7, Section 7. a. that:

> 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.

It follows, according to the District, that if the complaint is not dismissed, it must be deferred to grievance arbitration.

The REA asserts "the facts pleaded by the complainant and reasonable inferences therefrom (must be) accepted as true," and that the present complaint "essentially alleges that the (District) has purposely delayed the processing of grievances with the REA and has intentionally interfered with the REA's ability to effectively represent its members." From this, the REA concludes that its complaint sets forth facts sufficient to demonstrate violations of Sec. 111.70 (3)(a)1, and 3, Stats. 3/ The REA notes "(g)rievance processing is an activity within the protection of Sec. 111.70(2), and interference with such concerted protected activity is a violation of MERA." From this, the REA argues that the present complaint does not represent "a situation where the contractual remedies for the grievances giving rise to the dispute first have to be exhausted" since the "crux of the complaint is that the employer has engaged in activities which tend to chill the exercise of protected rights." The chilling effect the REA argues represents the result of District action interfering with the REA's ability to "appropriately administer the contract and present . . . grievances." This effect is significant to the REA for two reasons. First, according to the REA, this effect has a statutory significance since any interference, minimal or substantial, with a collective bargaining representative's ability to administer a collective bargaining agreement constitutes a violation of MERA. Second, the statutory dimension to the issue means that the chilling effect cannot necessarily be brought before an arbitrator for ruling. It follows, according to the REA, that the present complaint does state a cause of action under Sec. 111.70(3), Stats., and that deferral of the matter to grievance arbitration would not be proper.

DISCUSSION

The implemented work rules referred to by each party contain time limits for processing grievances and provide for final and binding arbitration. As the parties' arguments demonstrate, the subject matter of the present complaint could arguably be addressed in either the grievance arbitration or the prohibited practice forum, or both.

The relationship between these two forums has been addressed in prior Commission cases. The Commission's deferral doctrine, which defines the balance between the two forums, was set forth by Examiner Houlihan in a proceeding involving the same parties to the present dispute thus:

> 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

---

3/ The complaint filed on October 31, 1984, does not allege any violation of Sec. 111.70(3)(a)3, Stats., and no violation of this Section will be discussed. This allegation, even if assumed to be before the Examiner, would not change the analysis below.

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. 4/

The deferral doctrine seeks to avoid the unnecessary cost, the potentially conflicting results, and the creation of incentives to avoid agreed-upon methods of dispute resolution that can result from parallel proceedings concerning the same factual matter. 5/ The three criteria set forth above seek to assure that grievance arbitration is given the greatest effect possible. The third criteria clarifies that such deference will be minimized where important issues of law or policy are at stake.

The present complaint alleges violations of Secs. 111.70(2), and (3)(a)1 and 5, Stats., based on "a pattern of delaying the processing of grievances until the end of the time limits set forth in the implemented work rules," and on a failure of the District to meet the timelines with regard to the processing of four specific grievances. Sec. 111.70(2), Stats., sets forth certain rights of municipal employes which are enforced in Sec. 111.70(3), Stats. Thus, analysis of the alleged District violations, must center on Sec. 111.70(3), Stats. and not separately on Sec. 111.70(2), Stats. The alleged District violation of Sec. 111.70(3)(a)5, Stats., if proven, would also establish a derivative violation of Sec. 111.70(3)(a)1, Stats. The REA also argues that the District's behavior in the present case "directly interferes" with the REA's ability to administer the contract. This assertion, if proven, would establish an independent violation of Sec. 111.70(3)(a)1, Stats.

The alleged violation of Sec. 111.70(3)(a)5, Stats. and the derivative Sec. 111.70(3)(a)1, Stats., violation must be deferred to arbitration under the Commission's established deferral doctrine. The District has waived objections that would preclude a decision by a grievance arbitrator on the merits of the alleged violation of the implemented work rules. The express time limits set forth in those work rules establish a standard under which an arbitrator could determine an alleged pattern of violations or a specific violation in the timely processing of grievances. Finally, no important issue of law or policy exists regarding the alleged violation of Sec. 111.70(3)(a)5, Stats., and the derivative violation of Sec. 111.70(3)(a)1, Stats. For an examiner to hear the alleged Sec. 111.70(3)(a)5, Stats., violation in place of, or concurrently with, a grievance arbitrator would subvert the grievance arbitration procedure.

Nor can it be said that the possibility of an independent violation of Sec. 111.70(3)(a)1, Stats., presents an important issue of law or policy which dictates that the present matter not be deferred to arbitration. As noted above, the factual basis of this allegation can be heard by an arbitrator since the alleged pattern of violations or the alleged specific violation regarding the processing of four grievances can be addressed by an arbitrator as a violation of the expressed time limits of the implemented work rules. The REA accurately points out that an arbitrator may not enter a finding regarding the statutory violations alleged even if one would otherwise be appropriate. This possibility must be acknowledged, but does not constitute a valid basis to warrant parallel prohibited practice and grievance arbitration proceedings. If an arbitrator determines that the District's conduct has violated the implemented work rules, then the Sec. 111.70(3)(a)5, and derivative Sec. 111.70(3)(a)1, Stats. violations have been established, and the sole question remaining would be the adequacy of any contractual remedy afforded. If the arbitrator determines the District has not violated the work rules, the statutory issue is clarified, if not eliminated. In either event, the possibility of a statutory violation is not sufficiently compelling to warrant parallel arbitration and prohibited practice proceedings.

4/ Racine Unified School District, Dec. No. 18443-B (Houlihan, 3/81), citing, among other cases, Milwaukee Board of School Directors, Dec. No. 11330-B (WERC, 6/73), and School District of Menomonie, Dec. No. 16724-B (WERC, 1/81).

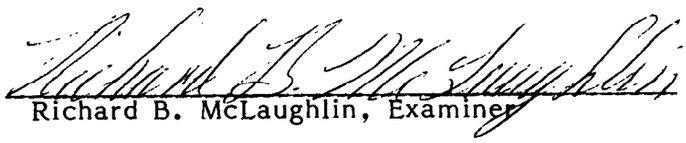
5/ See, Milwaukee Board of School Directors and Steven A. Vrsata, Dec. No. 10663-A (Schurke, 3/72).

That the subject matter of the present complaint may arguably have a statutory dimension can more effectively be addressed by the retention of jurisdiction over the matter. To go any further would unnecessarily intrude on the grievance arbitration procedure.

The District's motion to dismiss cannot be granted. Under such a motion, the complaint must be liberally construed in favor of the complainant with the motion being granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 6/ In the present matter the REA alleges a pattern of delay in District processing of grievances as well as a specific District violation in processing four specific grievances. The District has denied these allegations and a question regarding the District's compliance with the provisions of the grievance procedure has been raised. Since the implemented work rules are acknowledged by both parties to be subject to grievance arbitration, since those rules expressly provide timelines, since the parties raise a question regarding the application of those provisions, and since neither party asserts that any work rule specifically excludes arbitration of this matter, an arbitrable issue has been raised. As noted above, the merits of this issue has been deferred to arbitration and to grant the District's motion to dismiss on this record would subvert the arbitration process. Accordingly, I have deferred the complaint to the grievance arbitration procedure, and have retained jurisdiction over the matter in order to insure that the matters raised by the complaint are materially resolved, and, if appropriate, adequately remedied by the arbitration procedure.

Dated at Madison, Wisconsin this 24th day of April, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

6/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra, 12/77).