

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE TEACHERS'	:	
EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	Case 172
	:	No. 36019 MP-1792
vs.	:	Decision No. 23150-A
	:	
MILWAUKEE BOARD OF	:	[WERC is using the following
SCHOOL DIRECTORS,	:	electronic file name:
	:	23150-B]
	:	
Respondent.	:	
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Appearances:

Perry, First, Reiher, Lerner and Quindel, S.C., Attorneys at Law, by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, WI 53202, appearing on behalf of the Milwaukee Teachers' Education Association.

Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, Room 800, City Hall, 200 East Wells Street, Milwaukee, WI 53202, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee Teachers' Education Association having, on November 15, 1985, 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 Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on December 27, 1985, 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 Sec. 111.07(5), Stats.; and the parties having waived hearing in the matter and having agreed that the record in Case 170, No. 35990, MED/ARB-3632 would also be the record in the instant matter; and the parties having filed briefs with the Examiner and the Respondent having filed a reply brief and the Complainant having, by a letter dated October 8, 1986, indicated that it would not be filing a reply brief; 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 Milwaukee Teachers' Education Association, hereinafter referred to as the Association, is a labor organization and is the certified exclusive bargaining representative for all regularly employed substitute per diem teachers and its offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.
2. That Milwaukee Board of School Directors, hereinafter referred to as the District, is a municipal employer which operates a public school system in Milwaukee, Wisconsin and its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.
3. That the District and the Association were parties to a collective bargaining agreement covering substitute teachers for the period January 1, 1983 to December 31, 1985.
4. That on or about September 8, 1985, the District and the Association exchanged proposals to be included in a successor agreement to the 1983-85 agreement; that the parties met in negotiations on October 2, 1985, and each side explained to the other its respective proposals; that the parties agreed to put the proposals in a side-by-side format with the expired agreement and then scheduled another meeting; that the parties again met on October 16, 1985, at which time they numbered their respective proposals and gave a more detailed explanation of the proposals with supporting rationale; that the District indicated that at the next meeting there was a possibility of substantial movement on its part; and that a third meeting was scheduled.

5. That the parties again met on November 6, 1985; that the Association indicated that it would sign off a number of editorial proposals; that the District then unconditionally dropped about twelve of its proposals and a discussion ensued on the priority of some of the remaining proposals; that the parties caucused for a short time and thereafter the District gave the Association a total package proposal with an option for three mini packages which could be signed off on separately; the parties again caucused for a period of time and when they met again, the Association responded to the District's package proposal; that the Association also indicated certain trade-offs and modification of its proposal; that the District expressed disappointment with the Association's response to the District's package proposal and indicated that at that point there was no basis for agreement on any of the Association's counterproposal; and that the meeting abruptly concluded with discussion of setting another meeting.

6. That on November 7, 1985, the District filed a petition with the Wisconsin Employment Relations Commission alleging that the parties had reached an impasse after a reasonable period of negotiation and requested the Commission to conduct an investigation and certify the result thereof and determine whether mediation-arbitration should be initiated; that on November 13, 1985 the Association filed a motion to dismiss the District's petition for mediation-arbitration; and that on November 15, 1985, the Association filed the instant complaint alleging that the District refused to bargain in good faith by filing said petition prematurely.

7. That on or about January 6, 1986, the Association attempted to set up a negotiation session with the District; that the District refused to meet without the presence of the WERC investigator; and that on May 29, 1986, the Commission denied the Association's motion to dismiss the District's petition.

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

CONCLUSION OF LAW

1. That the District, by filing a petition to invoke the mediation-arbitration provision of Sec. 111.70(4)(cm)6, Stats. on November 7, 1985, and refusing to meet without the presence of the investigator did not fail or refuse to bargain in good faith with the Association within the meaning of Sec. 111.70(1)(6), Stats., and therefore, the District has not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

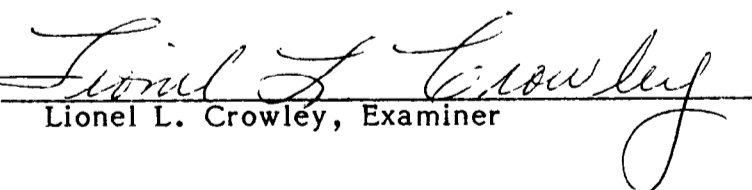
Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

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

Dated at Madison, Wisconsin this 1st day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Lionel L. Crowley, Examiner

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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  
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1/ (Continued)

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

Background

In its complaint, the Association alleged that the District committed prohibited practices in violation of Sec. 111.70(3)(a)4, Stats., by failing and refusing to bargain in good faith for a reasonable period of time, by artificially declaring an impasse and by prematurely invoking the mediation-arbitration provision of Sec. 111.70(4)(cm)6, Stats. The District answered by asserting that the petition for mediation-arbitration was not premature and denied that it had committed any prohibited practices.

Association's Position

The Association contends that the District has failed and refused to bargain in good faith by insisting that the Association drop the vast majority of its proposals, which had not been meaningfully discussed, as a condition for further negotiations. It argues that the District broke off negotiations and in effect gave the Association a take it or leave it ultimatum and when the Association refused to drop its proposals, the District prematurely petitioned for mediation-arbitration. The Association submits that it is a prohibited practice for an employer to refuse to continue negotiations unless its conditions for negotiations are met by the union. It cites references to private sector cases of unfair labor practices by an employer's refusal to discuss non-economic issues until economic issues were resolved, by an employer's refusal to discuss economic items before disposing of non-economic items and by an employer's refusal to discuss any aspect of a package separately as being similar to the instant case and likewise destructive of the bargaining process. The Association also asserts that its objection to the District's filing of the med-arb petition did not prevent the parties from continuing negotiations and the District's refusal to meet during the period to decide the motion constituted a refusal to bargain in good faith. It requests a finding that the District has violated its duty to bargain and seeks an order that the District cease and desist from failing and refusing to negotiate in good faith with the Association.

District's Position

The District contends that its filing of the mediation-arbitration petition did not constitute a prohibited practice. It argues that a petition for mediation-arbitration is instituted to accelerate and not to delay negotiations. It submits that the Association has sought to delay the proceedings as evidenced by its refusal to drop any of its demands after three meetings. It alleges that the District was found to have acted properly in filing its med-arb petition as the Association's motion was denied. It points out that negotiations take place with the presence of an investigator and it would be against public policy to subject a party to a charge of a refusal to bargain in good faith by merely filing a petition for mediation-arbitration. It asserts that the evidence fails to establish that the District acted contrary to the obligation to bargain collectively with the Association.

The District contends that the Association's reliance on private sector case law is inapplicable to the public sector because unlike the private sector, interest arbitration is an integral part of the dispute resolution process. The District requests that the complaint be dismissed and asks that it be awarded costs and attorneys fees as well as directing the Association to publish the decision in the Association's publication because the complaint is frivolous and filed in bad faith to harass and embarrass the District.

Discussion

Section 111.70(4)(cm)6, Stats., provides that either party, or the parties jointly, may petition the commission, in writing, to initiate mediation-arbitration. The Commission previously denied the Association's Motion to Dismiss the District's petition for mediation-arbitration in this matter. The Commission indicated that the requirements of Sec. 111.70(4)(cm)6, Stats., are not

prerequisites for the initiation of an investigation. 2/ The Commission stated its rationale as follows:

"In practice, upon receipt of a petition for mediation-arbitration, the Commission assigns an investigator who weighs the various factors in a given case, including the extent of prior negotiations, in determining how best to process the petition toward the objectives of voluntary settlement, avoidance of undue delay, and effective use of agency resources. Unless the matter has been previously mediated or the parties have formally agreed to waive Commission mediation, the investigator will ordinarily endeavor to mediate the dispute as a part of the investigation, giving consideration to the extent of prior negotiations and other factors in making judgments about when to meet with the parties, when to call for final offer exchanges, and when to draw the investigation to a close. The Commission relies heavily on the investigator's professional assessment of each situation based upon the investigator's discussions and meetings with the parties. Where the Commission or the investigator have reason to believe that a mediation effort is or would be premature, it may be suggested to the parties that they engage in further unmediated negotiations; and, in extreme situations, the investigator may recommend that the Commission formally order further unmediated negotiations as a condition precedent to an order initiating mediation-arbitration in the matter.

For the foregoing reasons, we conclude that the assignment of an investigator to weigh the various factors and determine the most appropriate course of action in a given investigation is both a more practical approach and one more conducive to reaching a prompt resolution of the parties' negotiations than is a procedure entitling the parties to a formal hearing and determination as to whether a reasonable period of negotiations has preceded petition filing.

It would appear that this rationale is also applicable to the instant complaint."

The issue presented in the instant case is whether the District engaged in bad faith bargaining by its petition for mediation-arbitration. The Association has made reference to a number of private sector cases which hold that conditioning bargaining on receiving concessions is bargaining in bad faith. The undersigned finds that these cases are not applicable to the facts of the instant case. While conditioning bargaining based on receiving concessions is in itself a prohibited practice, it is not a prohibited practice merely to file a petition for mediation-arbitration. 3/ It would be incongruous that a provision of MERA granting a statutory right could result in a prohibited practice upon the good faith exercise of such right. The statutory impasse procedures are an integral part of bargaining contemplating the continuation of negotiations with the assistance of a third party neutral. 4/ Such a procedure is not applicable to the private sector cases cited by the Association. MERA provides for the use of the impasse procedures and to penalize their good faith use would be counterproductive. If the mere filing of a petition could be determined to be a prohibited practice, the exercise of the right to file would be chilled which could result in a recalcitrant party delaying the process and engaging in dilatory conduct. Section 111.70(4)(cm)6, e, Stats., provides that mediation-arbitration proceedings shall not be interrupted by reason of any prohibited practice

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2/ Milwaukee Public Schools, Dec. No. 23689 (WERC, 5/86).

3/ This is comparable to the right to petition for a continuation referendum in a fair share case. See Green County, Dec. No. 20030-D (McCormick, 10/83).

4/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84); Green County, Dec. No. 20308-B (WERC, 11/84).

complaint filed by either party at any time; however, the mere threat of possibly being found to have committed a prohibited practice by filing a petition would naturally delay the proceedings. The right to file a petition should not be hampered in this fashion.

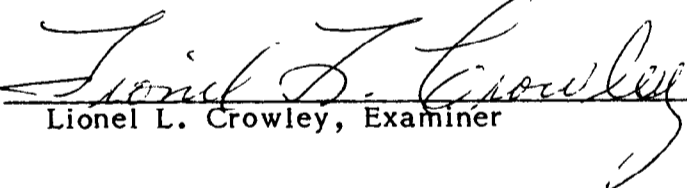
The Association argues that the District refused to negotiate unless the Association dropped its demands. The evidence established that the District was not refusing to negotiate unless demands were dropped but was merely requesting that negotiations on all proposals continue with the third party investigator present. The evidence also failed to establish that the District by filing its petition acted in bad faith. The District's assessment of negotiations was that the Association's failure to withdraw or modify its proposals after the District made its package proposal indicated that further bilateral negotiations would be fruitless. The District may have been in error in its assessment of the Association's willingness to continue productive negotiations; however, this is not sufficient to establish that its petition was filed in bad faith.

The Association asserted that the District should have continued bilateral negotiations during the pendency of the Association's motion to dismiss. This argument loses much of its persuasiveness in that the Association's indication of a desire to meet in negotiations came on January 6, 1986, about two months after the District's petition was filed. Had there been no motion to dismiss the petition, it is likely the parties would have been back in negotiations, albeit with the investigator sooner than this. Furthermore, to compel negotiations because one party asserts that the negotiations are not at an impasse would be contrary to the provisions of Sec. 111.70(4)(cm)6, Stats. which allows one or both parties to file a petition. Requiring a party who believes the parties are at impasse to continue to negotiate would be an exercise in futility. Therefore, for these reasons the undersigned has found that the District has not refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats. and has dismissed the complaint in its entirety.

Contrary to the District's claim for costs and attorneys fees and publication of this decision in the Association's membership publication, the undersigned finds that such a claim must be denied as inappropriate as the evidence fails to establish that the Association's contentions in this matter were so frivolous or offered in bad faith so as to warrant such relief. 5/

Dated at Madison, Wisconsin this 1st day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Lionel L. Crowley, Examiner

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5/ Rock County, Dec. No. 23656 (WERC, 5/86).