STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 173 No. 36114 MP-1800 Decision No. 23223-C

Appearances:

Perry, First, Lerner, Quindel and Kuhn, S.C., Attorneys, by Mr. Richard Perry and Ms. Barbara Zack Quindel, 823 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of Complainant.

Mr. Stuart S. Mukamal, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Milwaukee Teachers' Education Association filed a complaint on December 10, 1985 with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors had violated Section 111.70(3)(a) 1 and 4, Wis. Stats., by conditioning bargaining over a small number of proposals on Complainant's dropping a large number of its proposals outright without discussion. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.70(5), Wis. Stats. A hearing was held in Milwaukee, Wisconsin on July 8, 1986, at which time the parties were given full opportunity to present their evidence and arguments. Briefing was delayed at the agreement of both parties to permit settlement attempts to continue; extended settlement negotiations were unsuccessful, briefs were filed by both parties, and the record was closed on June 1, 1988. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee Teachers' Education Association is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats., and has its principal office at 5130 West Vliet Street, Milwaukee, Wisconsin 53208. Donald Deeder is Assistant Executive Director of Milwaukee Teachers' Education Association and is its agent.

2. Milwaukee Board of School Directors is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., and has its principal office at 5225 West Vliet Street, Milwaukee, Wisconsin 53208. Edward Neudauer is Executive Director of the Department of Employe Relations of Milwaukee Board of School Directors and is its agent.

3. At all times material to this proceeding, Complainant has been the certified exclusive bargaining representative of the following unit of employes employed by Respondent:

> All regular teaching personnel (hereinafter referred to as teachers) teaching at least 50 percent of a full teaching schedule or presently on leave, as well as those teaching on a regular part-time basis less than 50 percent of a full

teaching schedule, including guidance counselors, school social workers, teacher -librarians, traveling music teachers and teacher - therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialists, activity specialists, music teachers 550N who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, diagnostic teachers, vocational work evaluators, community human relations coordinators, human relations curriculum developers, mobility and orientation specialists, community resource teachers, program implementors, curriculum coordinators and Montessori coordinators, excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors and executives.

4. The 1982-85 collective bargaining agreement between Complainant and Respondent concerning the bargaining unit described in Finding of Fact 3 of above expired on June 30, 1985. On March 25, 1985 the parties met and exchanged proposals for a successor agreement; Complainant proposed 193 new proposals, while Respondent proposed 98 proposals. Thereafter, the parties met in approximately fifteen negotiation or mediation meetings by November 26, 1985. During the course of these meetings, the District identified as allegedly permissive items 75 items in the prior agreement and 63 of Complainant's new proposals; on August 8, 1985 Complainant filed a petition with the W.E.R.C. for a declaratory ruling concerning the mandatory or permissive nature of these approximately 130 items. A declaratory ruling was subsequently issued by the Commission on February 27, 1987. Also during this period, a request for mediation was filed by the parties, and on October 3, 1985, an interest-arbitration petition was filed pursuant to Section 111.70, Stats. The Commission's mediator -investigator then proceeded to meet with the parties on a number of occasions in attempts to assist them to reach an agreement. The parties ultimately reached agreement, and the petition for interest arbitration was dismissed on August 17, 1987.

5. During the course of the November 26, 1985 mediation meeting, substantially the following colloquy took place:

(Neudauer) It was an interesting exercise yesterday going through all of the proposals which we truly have gone through many times. We haven't gone through your proposals which were permissives that much before, but we had an opportunity to go over everything and we feel at this point in negotiations with, well, let's see, six months since the expiration of the contract. What we are doing is just totally ludicrous. We are starting to fool around with the 32, sub c. paragraph 4, when we are not really addressing the big issues at all. And, we did not believe, we believe that if you want to progress based upon the way that you were sending stuff to us, you know we're talking just to get through the proposals, six, seven months. And, we really don't believe that's the way to negotiate. If you wanted to do that stuff, you had all summer to do that. I think, what we need to do is get the contract settled, and not play foolish games. This is not 1974, its 1985. And the stuff that you did back in the olden days isn't really going to get the contract settled quickly enough. So your needs are our needs. What we have done as a result of everything yesterday and reconsidering all of our positions and to some extent, based upon the fact that we believe what you have done in the last week is an escalation of your previous proposals, is we have re-examined our total position and we have a comprehensive offer. This offer can be considered to be the jist (sic) of all of our proposals and the proposals of yours which we wish to respond to. Any of our proposals that are not on here, you can consider to be dropped. Any of your proposals that are not treated on here, you can consider the answer to them as being no. We have included on the package a statement, "if the parties are able to reach a voluntary settlement which includes language allowing the board to establish minimum qualifications, the board will not challenge remaining permissive language presently contained in the contract." Now, is this an

presently contained in the contract." Now, is this an ultimatum? No, it's not an ultimatum. It's a total comprehensive package. Are we saying the stuff in here is non-negotiable? We are not saying that. We are saying here is a package of proposals which we believe need to be addressed. We are addressing a number of the needs that you have expressed. When and if you are interested in negotiating and coming forward with a reasonable package of proposals, not 300 or some that you have on the table, or 200; then I think we will be at a point where we can sit down and consider other things. Under the present circumstances, the response to all other items is no. And this is, I don't have enough for everybody.

(Deeder) I think he said that they are responding to everything on the table from their point of view in this package. If it's not in here on their side, they are dropping the proposals, if it's not in here based on our side, it's a rejection of our proposals. Then he says something to the effect that if we reach an agreement on his package of proposals the board will not challenge the permissives and they will remain in the contract and this package is supposedly flexible as long as it's within the parameters of what he believes we can be negotiating.

(Neudauer) That's not what I said. This is our proposal. We said we would be happy to consider them if any proposals that you think there are others that should be added, if you're willing to put it in a manageable package, of major items, we are willing to consider any additional proposals. However, we are not going to go through an exercise of going through minutia (sic) one by one in an attempt to sign off all kinds of little stuff. That is not going to get us to a basic agreement. So what I said is, this is our total response and total package, but it is certainly not an ultimatum and it is certainly not limiting if you want to respond in kind, in a total package type of thing. In terms of reaching any kind of voluntary settlement, we certainly are not going to challenge anything in terms of permissives.

6. Following the exchange of views described above in Finding of Fact 5, Complainant and Respondent broke off discussions, and on December 10, 1985 Complainant filed the instant complaint, alleging that the Board's actions of November 26 constituted refusal to bargain concerning the 185 proposals of Complainant which were not part of the "package" proposed by Neudauer.

7. The record demonstrates that the discussion of November 26, 1985 took place against a background which included extensive and largely fruitless meetings concerning a large number of proposals, virtually all of which remained at issue some six months after the prior collective bargaining agreement had expired. The record fails to show that Respondent insisted on a single package of proposals or that it consistently refused to discuss or entertain comments concerning Complainant's full range of proposals. The record accrodingly fails to establish that the totality of Respondent's conduct was such as to limit discussion of all of the Complainant's proposals and to force discussion of only a small number of them.

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

CONCLUSION OF LAW

By proposing on November 26, 1985 a contract including only a limited number of the proposals of each side, Respondent did not refuse to bargain in good faith with Complainant, and Respondent has therefore not committed a prohibited practice within the meaning of Section 111.70(3)(a) 1 or 4, Wis. Stats.

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

ORDER 1/

It is ordered that the Complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 13th day of July, 1988.

By _____
Christopher Honeyman, 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

BACKGROUND

The complaint alleges that the Board violated Section 111.70(3)(a) 1 and 4 by refusing to bargain on any of the Association's proposals other than eight, and that the Board, by its chief negotiator's statements of November 26, 1985, conditioned future bargaining on the Association dropping the vast majority of its proposals. The answer alleges that the package of proposals urged by chief negotiator Neudauer was not an ultimatum but a good faith effort to provide momentum to a stalled collective bargaining process. The answer also denied that the majority of the Association's proposals constituted mandatory subjects of bargaining.

The facts are largely undisputed, and the central discussion on which this case turns was recorded on tape, according to the parties' joint custom. The transcript of that discussion, which appears above at Finding of Fact 5, was not materially disputed. Relevant to the discussion below is the fact that the record demonstrates that the parties had engaged in at least some discussion of all of the proposals on the table, though Neudauer's unrebutted testimony was to the effect that some of these proposals had recurred from previous rounds of bargaining and may not have been discussed in any detail during the 1985 negotiations as opposed to earlier. I note particularly that Complainant's chief negotiator Deeder testified that the Association had encountered difficulty in pursuing discussions of large numbers of issues in previous years' negotiations with the Board, and that the Association had used mediation to ensure full discussion of all relevant matters. I note also that Deeder testified that following the proposal the Board made in the November 26, 1985 mediation session, the Association had made no new proposal in reply by the July 8, 1986 date of the hearing. The remaining essential facts are stated in the Findings and need not be repeated here.

THE PARTIES' POSITIONS

Complainant contends that the totality of the Employer's conduct here demonstrates refusal to discuss or consider the merits of the vast majority of the Association's proposals, and that the November 26, 1985 meeting sharpened that point by the Board's insistence on negotiating solely on 28 items of its own choosing, (20 of its own and 8 of the Association's). Complainant cites City of Janesville 2/ as demonstrating that refusal to comment on union proposals is a form of bad faith bargaining. Complainant argues that the District conditioned bargaining on the Association's dropping of all but a "manageable" number of its proposals, and demonstrated flat refusal to bargain on any of the "minutia" or "little stuff". Complainant alleges that this constitutes refusal to enter into the give-and-take of collective bargaining. Complainant also alleges that this particular tactic was designed to ensure that no agreement could be reached, because it was predictably unacceptable to the Association in view of the Association's past bargaining history, citing N.L.R.B. vs. A-1 King Size Sandwiches. 3/

Respondent contends that the course of bargaining over the six months preceding the meeting involved here demonstrates bad faith on Complainant's part, and avers that its own behavior has been entirely consistent with an intent to reach agreement promptly. Respondent contends that the bargaining process had been completely stalled, as evidenced by the number of meetings which had taken place without substantial numbers of proposals being dropped or agreed upon, and that the approach taken by Neudauer on November 26 was a response to this condition. Respondent further alleges that the transcript of Neudauer's statements clearly show that no ultimatum was intended.

2/ Dec. No. 22981-B, A (W.E.R.C., 4/86)

3/ 116 LRRM 2658 (11th Circuit, 1984).

DISCUSSION

In Janesville 4/ and cases cited therein it is clear that determinations of whether a party's tactics at the bargaining table constitute refusal to bargain in good faith must be made in light of the totality of conduct of the party involved, and also in light of the opposing party's conduct in its totality. Certain types of conduct constitute a per se violation, 5/ but these do not include the parties' proposals to each other or their bargaining tactics as such.

It is clear from both the transcript and the circumstances of the November 26 meeting that Neudauer's proposal was exactly that, a tactic adopted at a particular point in negotiations. Assuming, for purposes of argument, that unrelieved insistence on negotiation of only a few of many proposals on the table, coupled with refusal even to discuss the remainder, would constitute refusal to bargain in good faith, I find the record here clearly demonstrates that such consistency of mission was not present here. Fifteen bargaining meetings had taken place prior to the November 26 board proposal, and during the course of those meetings, as Neudauer testified without Association rebuttal, the import of all of the Association's proposed language was addressed at least to a degree. Neither the Association nor the Board then made any substantial number of concessions to the other's position, and the Association filed a declaratory ruling proceeding in response to the District's challenges, which ultimately resulted in a large number of items being found permissive subjects of bargaining by the Commission. In the Order Denying Motion to Dismiss issued April 27, 1988 in this matter 6/ I noted that some 50 to 80 subjects remained mandatory subjects of bargaining within the Association's proposal. But I do not read Neudauer's statements as being an outright refusal to negotiate concerning the Association's mandatory proposals. Neudauer explicitly stated that the November 26 proposal was "not an ultimatum" and that it was "a package of proposals which we believe need to be addressed". The fact that Neudauer then said "Under the present circumstances, the response to all other items is no" does not indicate that the Board's proposal would be no to all items under all circumstances, nor does it even indicate that the Board permanently conditioned any agreement (on the 8 items it proposed concessions on) upon dropping of identified other items. I read this proposal as, purely and simply, a gambit designed to try to lure the Association into reducing its proposals, and nothing more than that. To say otherwise in the face of this particular proposal would amount to a statement that a party may not insist vigorously on adoption of its proposals or its preferred style of negotiating. That would fly in the face of the bombast, rhetoric and acrimony generally tolerated in the real world of bargaining. I note further that the November 26 proposal took place shortly after the Board had been disappointed by a misunderstanding between it and the Association, in which the Board had (apparently inadvertently) been given the impression that the Association was prepared to negotiate a contract which essentially involved the status quo on all language items, together with monetary improvements. This appears to have contributed to the Board's November 26, 1985 proposed approach, and also enters into the "totality of conduct" measurement. In the same vein, I note that the Association had arrived at November 26 without agreeing to any substantial number of the Board's proposals, just as the Board in eight months' bargaining had declined to agree to any substantial number of the Association's proposals. Under these circumstances, to equate---as the Association's brief clearly does---the bargaining gambit of November 26 with Janesville's outright and continued refusal to discuss any matters of substance, would be contrary to the "totality of conduct" principle. I therefore conclude that the Board's November 26, 1985 proposal does not constitute a refusal to bargain in good faith.

Attorney's Fees and Costs

Respondent requests that the Commission award attorney's fees and costs, on grounds that the complaint was filed in bad faith and for purposes unrelated to

---

4/ Supra.

5/ See e.g. N.L.R.B. vs. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

6/ Decision No. 23223-B.

the legitimate statutory objectives of the Municipal Employment Relations Act, citing Joint School District No. 8, Villages of Fox Point, Bayside, River Hills and City of Glendale 7/ and other cases. In the present case, it is apparent that Respondent's view of the complaint herein is grounded in part in the mutual acrimony which has developed between these parties over a long series of proceedings. The record fails to demonstrate that the legal arguments on which the complaint is based are in and of themselves insubstantial, and, as noted above, the case turns upon the view taken of the particular facts involved, particularly the meaning of the negotiations on a particular day. The fact that the complaint is unsuccessful does not mean that it is made in bad faith or that the legal arguments on which it is predicated are flimsy. I note also that in the Fox Point case the cited (and denied) request was made against a respondent, not a complainant. I find the request to be without merit.

Dated at Madison, Wisconsin this 13th day of July, 1988.

By _____
Christopher Honeyman, Examiner

7/ Decision No. 16000-A, W.E.R.C., 10/79.