STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Complainant, vs. MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Respondent.	Case 178 No. 36623 MP-1822 Decision No. 23495-A

Appearances:

Ms. Deborah A. Ford, Labor Relations Specialist, Department of Employee Relations, Milwaukee Public Schools, 5225 West Vliet Street, P.O. Box Drawer 10-K, Milwaukee, Wisconsin 53201-8210, appearing on behalf of the Complainant.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Board of School Directors having, on March 3, 1986, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Teachers' Education Association had committed prohibited practices within the meaning of Sec. 111.70(3)(b)3 of the Municipal Employment Relations Act by refusing to bargain in good faith; and the Commission having, on April 3, 1986, 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 agreed that hearing in the matter be postponed pending the outcome of other proceedings; and hearing on said complaint having been held on February 2, 1988 in Milwaukee, Wisconsin, and the parties having filed briefs in the matter which were exchanged on April 5, 1988; and the Examiner having considered the evidence and the arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Board of School Directors, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., which operates a public school system in Milwaukee, Wisconsin; that its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208; and that Edward Neudauer is the District's Executive Director of Employee Relations and at all times material herein was the Chief spokesman for the District in negotiations and has acted on its behalf.

2. That Milwaukee Teachers' Education Association, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. and is the certified exclusive collective bargaining representative for teachers of the District; that its offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208; and that Donald Deeder is the Association's Assistant Executive Director and was the Association's Chief negotiator from July, 1969 to January, 1986 and has acted on its behalf.

3. That the Association surveyed its members for bargaining proposals for a collective bargaining agreement to succeed an agreement that expired by its terms on June 30, 1985, the result of which was 203 proposals; that Deeder separated these proposals into 144 that he considered mandatory and 59 which he thought the District might challenge as permissive; that these were recommended to the Association's Executive Board in February, 1985 to be submitted to the District; that it was indicated that some of the proposals that might be challenged were among the highest priorities of the teachers and these proposals might have to be pursued politically at the Local and State level; and that on March 25, 1985, the

parties met and exchanged proposals with the Association proposing around 190 and the District proposing around 100 which was typical of the number of proposals initially proposed in past negotiations.

4. That on May 1, 1985, the parties met in negotiations and the District provided the Association with two lists, one entitled, "Permissive Language Contained in Current Teacher Collective Bargaining Agreement," and another entitled, "Permissive Proposals Identified in MTEA Initial Bargaining Proposals"; that the District went over these lists and gave its rationale for its position that the items were permissive; that Deeder expressed disagreement with the District as to the permissive status of all items on the first list related to present contract language; and that with respect to the list related to the new contract proposals, Deeder indicated that with the exception of three proposals the District could assume that those were permissive unless they heard otherwise from him.

5. That on May 15, 1985, the parties met again in bargaining and Deeder informed Neudauer that an agreement could not be reached absent a decision on the items identified in the lists of permissive items and indicated the District should commence a declaratory ruling on both lists, those related to the current contract and those related to the Association's proposals; that Neudauer declined to do so and on June 24, 1985 sent a letter to Deeder indicating that the District was willing to leave certain items in the agreement, identified certain items that could be agreed to with minor changes and others he felt the parties could resolve through negotiation; that the parties met informally to attempt to resolve these matters but were unsuccessful with Deeder taking the position that as long as the District considered these items permissive rather than mandatory, bargaining in its truest sense could not take place as the District was only willing to bargain the permissive items by modifying them to be mandatory as viewed by the District and a declaratory ruling was therefore necessary.

6. That the parties met in negotiations on July 11, 1985 and the Association took the position that all the items identified by the District were mandatory and as long as the District considered them permissive the Association would not negotiate little wording changes that the District believed would make the proposals mandatory; that on or about August 8, 1985, the Association filed a Petition for Declaratory Ruling on the two lists which the District had indicated were permissive items; that on September 12, 1985, the District filed a Motion to Strike certain portions of the Association's Petition; and that the Commission on January 17, 1986 denied the Motion to Strike.

7. That during the pendency of the Declaratory Ruling petition, the parties entered into mediation; that the District during said mediation got down to 14-15 proposals and was of the opinion that the Association had limited its proposals to salary; that later in the mediation sessions, the Association made it clear that all its proposals were on the table; and that in early 1986, the parties reached agreement on a one year contract.

8. That on February 13, 1986, the Association engaged in informational picketing at the District's offices protesting the lack of progress in negotiations; that the Association's President indicated to the press that the District refused to talk about four issues of importance to teachers which were student discipline, class size, teacher prep time and a realistic salary package; and that the picketing was peaceful and was not accompanied by a refusal to perform work or any slowdown of work.

9. That on February 27, 1987, the Commission issued its decision on the Petition for Declaratory Ruling wherein 14 or 15 items were found mandatory, 10 or 11 were found mandatory in part, one item was found to be prohibited and the rest of the 117 items were found permissive in whole or in part.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Association, by refusing to bargain over items identified by the District as permissive proposals in the manner sought by the District, did not fail or refuse to bargain in good faith with the District, and therefore, the Association has not committed a prohibited practice within the meaning of Sec. 111.70(3)(b)3, Stats.

2. That the Association's filing a petition for a declaratory ruling on the items identified by the District as permissive was not done in bad faith such that the Association failed or refused to bargain in good faith, and therefore, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)3, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions 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 18th day of May, 1988.

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.

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the District alleged that the Association committed prohibited practices in violation of Sec. 111.70(3)(a)3, Stats. by the Association's refusal to bargain in good faith about contract language it considered mandatory but the District considered permissive where the District was willing to negotiate on said language, and the Association's insistence to impasse over proposals which were so well established as permissive as to constitute bad faith bargaining and conducting a campaign of picketing complaining that the District was responsible for lack of progress in negotiations. The Association answered said complaint asserting that it was willing at all times to negotiate mandatory subjects of bargaining but was not willing to change language on items it considered mandatory so that the District would agree they were mandatory. The Association alleged that it filed a declaratory ruling on the issue in dispute and that the Wisconsin Employment Relations Commission had not ruled that these proposals were permissive so its conduct was proper under the Municipal Employment Relations Act. The Association further answered that any picketing was peaceful and constitutionally protected free speech. It denied any refusal to bargaining in good faith and requested dismissal of the complaint.

DISTRICT'S POSITION:

The District contends that the Association misused the declaratory ruling process to frustrate bargaining and did not exercise its statutory rights in good faith. It submits that the Association did not have a good faith belief that certain proposals were mandatory, yet proceeded with a declaratory ruling and refused to negotiate over them and thus violated its duty to bargain in good faith. The District asserts that the Association's bargaining package recommendation expressly lists items considered permissive and that Deeder prepared the list based on his experience and working knowledge of Commission decisions and acknowledged at the May 15, 1985 negotiating session that most of the new proposals were permissive. It notes that a number of the proposals were the subject of a prior declaratory ruling and proposals involving class size and allocation of teacher workday have long been established as permissive. In light of this, the District takes the position that the Association did not have a good faith belief that the proposals were mandatory.

The District points out that the Association urged the District to seek a declaratory ruling on all items even though the District was willing to bargain these items. It submits that the Association's strategy was to force the District to negotiate on permissive items which it had no duty to do. As evidence of this strategy, the District refers to the Association's putting everything back on the table during mediation, conditioning further bargaining on permissive items and picketing because the District would not discuss permissive items. It notes that the sheer number of items found permissive demonstrates that the Association did not file the Declaratory Ruling petition in good faith but used the process to stall negotiations, and violated its duty to bargain in good faith. The District claims that the Association abused a statutory right and thereby committed a prohibited practice in violation of Sec. 111.70(3)(b)3, Stats.

ASSOCIATION'S POSITION

The Association denies that it engaged in bad faith bargaining by insisting that its proposals were mandatory subjects of bargaining. It points out that the District's claim that these proposals were previously ruled on by the Commission is the same argument the District raised in its Motion to Strike and the Commission rejected that argument. It notes that only six to ten of the proposals were identical and these were dropped by the Association, so the District's argument here has no basis. The Association asserts that the District's arguments with respect to Deeder's statements on May 1, 1985 do not support a conclusion of bad faith bargaining. It maintains that Deeder identified items he thought the District might object to a permissive and did not list them as items the

Association thought were permissive. It admits that Deeder did tell the District they could assume these were permissive unless they heard otherwise from him and two weeks later, he made it clear that it could not assume they were permissive and urged a declaratory ruling petition be filed. The Association claims that its prompt filing indicates good faith as opposed to the normal situation of waiting until submission of final offers and then filing a petition. It insists there was no obstruction or delay established here.

The Association notes that the Commission found that 25 of the 117 proposals were mandatory in whole or in part. It argues that the District was frustrated because the Association would not follow the District's script in bargaining by choosing to exercise its right to get a ruling from the Commission, but frustration does not convert such conduct to bad faith bargaining.

The Association contends that it never refused to bargain mandatory subjects and the District's claim that the District was willing to negotiate permissive items was nothing more than a demand that the Association change the language of its proposals so that they would be mandatory in the District's view. It submits that the evidence establishes that the District was not willing to seriously bargain these proposals substantively as if they were mandatory.

The Association argues that the District in a companion case (Case 173) raised arguments in conflict with its position here in asserting that the parties reached agreement which indicates the Association was continuing its negotiations with the District on mandatory subjects of bargaining. The Association maintains that its picketing did not violate Sec. 111.70(3)(b)3, Stats., was free speech and occurred prior to the Commission's determination that certain proposals were permissive. Even if it took place afterward, the Association asserts that this activity is within its First Amendment rights and the District can issue its own statements defending its position, but there is no basis for finding that the picketing was unlawful or part of any unlawful actions to force the District to negotiate permissive subjects of bargaining. The Association asks that the complaint be dismissed in its entirety.

DISCUSSION

Section 111.70(1)(a), Stats. defines collective bargaining, in relevant part, as:

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment, except as provided in s. 40.81 (3), with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. . . .

Section 111.70(3)(b)3, Stats. makes it a prohibited practice for a municipal employe in concert with others:

> 3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is that recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

Here, the District is alleging that the Association refused to bargain in violation of the statutes set out above, those proposals it identified as permissive even though the District offered to bargain on them and additionally,

the Association bargained in bad faith when it filed a declaratory ruling petition on proposals it knew were permissive.

With respect to the refusal to bargain those items identified as permissive, a municipal employer cannot be required to bargain on them but may do so voluntarily. 2/ Additionally, a labor organization cannot insist on bargaining permissive items to the point of impasse. 3/ Here, the District is asserting the reverse of the above. It insists that it offered to bargain permissive items but the Association refused. A review of the record does not establish any offer to bargain the items identified as permissive by the District. The District's Chief negotiator testified that items identified as permissive by him that were in the contract could easily be modified by a word or two to make them mandatory. 4/ He sent a letter to Deeder identifying items that could be left in the agreement and hinted at items that could be changed by negotiations. 5/ He testified that when the issue was discussed in mediation after the Association had filed its petition for a declaratory ruling, the District took the position that whether these items were permissive or mandatory, the District would not agree to them. 6/ Deeder had taken the position all along that the present contract language was mandatory and that the District's offer to negotiate was merely changing language he felt was mandatory simply to language the District would consider was mandatory. 7/ Deeder refused to engage in this type of negotiations until a decision was made that the item was permissive. Here, the parties were in disagreement over whether the language was permissive or mandatory and the District offered to negotiate that aspect. The record is not sufficient to establish that the District was offering to negotiate on the substance of the proposal even if it was permissive, except to say no. This distinction is a fine one but the District's insistence that the present language was permissive meant that the Association could not insist on it to the point of impasse if it were in fact permissive, whereas it could insist on it to the point of impasse if it were mandatory. Here, the negotiations were to get to language both considered mandatory rather than an offer to negotiate permissive items substantively. The District believed that the Association was holding up negotiations to force it to negotiate permissive items. 8/ This objection to the Association's conduct contradicts any offer to bargain such permissive items. If it had offered to negotiate permissive items, it would not object that it was being forced to negotiate them nor would there be any reason to stall if there was an offer to negotiate them. Thus, the evidence does not establish a clear offer to bargain items both parties considered permissive such that a refusal of such offer might be considered bargaining in bad faith.

The District's main agreement is that the Association abused the right to file a declaratory ruling because the Association did not in good faith believe that the items it was insisting were mandatory were in fact so. A party may act in bad faith in filing a declaratory ruling and in doing so could commit a prohibited practice. Section 111.70(4)(b) provides, in relevant part, the following:

> The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

2/ Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976).

3/ City of Lake Geneva, Dec. Nos. 12184-B, 12208-B (WERC, 5/74), City of Waupaca, Dec. No. 18410-A (Knudson, 6/81) aff'd by operation of Law, Dec. No. 18410-B (7/81).

4/ Tr - 22.

5/ Tr - 23.

6/ Tr - 28, 36.

7/ Tr - 53, 55.

8/ Tr - 37.

Thus, there are circumstances where the filing of a declaratory ruling may be in bad faith which under the circumstances would support a finding of a refusal to bargain. The circumstances present here however do not establish a case of bad faith. The Commission has held that a unit clarification petition advancing colorable claims under the Municipal Employment Relations Act which is not wholly unlawful in manner of presentation or purpose is protected activity. 9/ This same standard is appropriate for the filing of a Declaratory Ruling petition. In this case, the petition filed by the Association presented colorable claims. Although the District asserted that the same language had been ruled to be permissive and other proposals were generically permissive, the Commission in the Declaratory Ruling stated as follows:

> We acknowledge that our holding herein differs from an earlier decision in Milwaukee Board of School Directors, Dec. No. 20095-A, at 62. However, as we decide the status of proposals based upon the argument presented by the parties to the dispute, upon the record presented, and upon intervening case law developments differing results do occur when differing argument is present. (See proposals 27-31, footnote 4 and proposal 36 herein for other such instances). We further note that our earlier decision was affected, at least in part, by the failure of the MTEA to make any argument in support of many of its proposals. 10/

In other words, the same language may have a different status if arguments are more persuasive, intervening case law changes or the record is better developed. Thus, the mere fact that language is identical is not an indication that a petition was filed in bad faith. The District also asserted that Deeder had agreed that items were permissive at one point so the Association knew it was appealing items which were not mandatory. Deeder suspected that a number of these proposals were permissive but many were thought to be mandatory. His taking all of them rather than just those thought to be mandatory does not convert the petition to a bad faith abuse of a statutory right as the mandatory items would have to be decided in a ruling. In short, the petition was not wholly without merit. Also, while the end result of the Declaratory Ruling proceeding was that the vast majority of the items were held permissive, there were items held mandatory, so the petition was neither wholly without merit nor completely frivolous. If this were the only factor, the District's case would be stronger but there are other factors that support the Association's claim that the petition was not instituted in bad faith. One factor is the prompt filing of the declaratory ruling. Almost as soon as the District objected to the proposals as permissive, the Association urged a petition be filed to resolve this dispute. When the District declined to file a petition, the Association did even though the District had made the objections. This prompt filing does not evidence an intent to frustrate bargaining. Additionally, the parties continued negotiations and ultimately reached agreement on a successor agreement. This factor indicates that there was no deliberate attempt to stall or frustrate negotiations. There was evidence of an instance in mediation where items thought to be dropped were resurrected but this appears to be part of the ups and downs, give and take that occurs in normal negotiations and does not establish a pattern of conduct indicating an attempt to frustrate bargaining.

Finally, the District points to the Association's informational picketing as further evidence of the Association's bad faith and efforts to have the District negotiate on permissive items. The picketing is protected free speech and the Association is free to pursue permissive matters the same as other members of the public. 11/ The picketing appears to be nothing more than bringing the concerns of the Association in a public speech forum rather than at the bargaining table. The District made its response in the press and thus the picketing does not appear to be part and parcel of a campaign to stall or frustrate bargaining. 12/

9/ Monona Grove School District, Dec. No. 20700-G, (WERC, 10/86).

10/ Milwaukee Board of School Directors, Dec. No. 23208-A (WERC, 2/87) at 62.

11/ See Beloit Education Association v. WERC, supra.

12/ Ex .- E attached to the complaint.

Based on the above factors, the evidence fails to prove that the Association bargaining in bad faith by its refusal to bargain word changes in items identified by the District as permissive and the filing of its Petition for Declaratory Ruling on the items the District indicated were permissive, and therefore, a violation of Sec. 111.70(3)(b)3, Stats. has not been established and the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 18th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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