

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
SPARTA EDUCATION ASSOCIATION :
To Initiate Mediation-Arbitration : Case 21
Between Said Petitioner and : No. 36185 MED/ARB-3711
SPARTA AREA SCHOOL DISTRICT : Decision No. 24007

Appearances:

Mr. Thomas C. Bina, Executive Director, Coulee Region United Educators,
P. O. Box 684, LaCrosse, Wisconsin 54602-0684, for the Association.
Rice & Abbott, S.C., Attorneys and Counselors, by Mr. J. David Rice,
112 West Oak Street, P. O. Box 400, Sparta, Wisconsin 54656, for the
the District.

ORDER DENYING MOTION TO REOPEN
MEDIATION-ARBITRATION INVESTIGATION

The Sparta Education Association having, on December 17, 1985, filed a petition with the Wisconsin Employment Relations Commission wherein it alleged that an impasse existed between it and the Sparta Area School District in their collective bargaining and wherein it further requested the Commission to initiate mediation-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats.; and at the joint request of the parties, Stephen Schoenfeld, a member of the Commission's staff, having been assigned to the matter and having conducted an investigation of the petition on March 31, May 6 and August 28, 1986; and at the conclusion of the August 28, 1986 meeting the Investigator having closed the investigation; and the Investigator having thereafter submitted his report of the results of his investigation to the Commission wherein he informed the Commission that the investigation had been closed and wherein he further recommended that an order directing the parties to mediation-arbitration should be issued; and, in response to a telephonic request from the District that the investigation be reopened, the Investigator thereafter having advised both parties that he would reopen only at the request of both parties; and the Association having informed the Investigator, by letter dated September 5, 1986, that it did not want to have the investigation reopened; and prior to any further action by the Commission, the District, on September 9, 1986, having filed a Motion to Reopen Mediation-Arbitration Investigation with accompanying Affidavit; and the Commission having, by letter dated September 16, 1986, advised the parties that a review of the Affidavit and related correspondence between Investigator Schoenfeld and the District's legal counsel did not reveal any factual disputes and that the Commission therefore intended to proceed to resolve the Motion after receiving any further written argument from the parties; and the District having filed such argument on September 24, 1986; and the Association having elected not to submit argument; and the Commission, being satisfied that as there are no factual disputes, the Motion

can be ruled upon without the need for hearing, and having reviewed the Motion, the Affidavit, related correspondence and the District's argument, and being satisfied that it should deny the District's Motion;

NOW, THEREFORE, it is

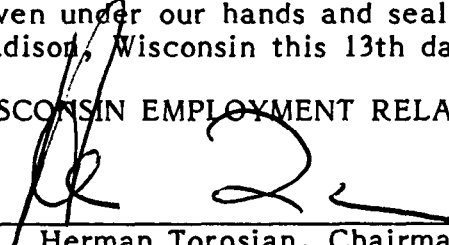
ORDERED

That the Motion to Reopen Mediation-Arbitration Investigation be, and the same hereby is, denied.

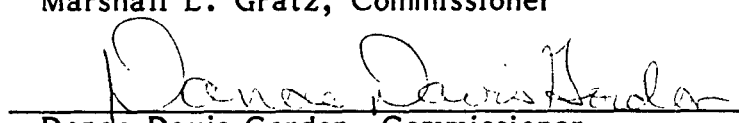
Given under our hands and seal at the City of
Madison, Wisconsin this 13th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION
TO REOPEN MEDIATION-ARBITRATION INVESTIGATION

The basis upon which the District asks us to reopen the investigation is quite limited. The District acknowledges that it is not contending that the Investigator failed to comply with ERB 31 when conducting or closing the investigation or that the District did not consent to the close of the investigation on August 28, 1986.

The District argues that where, as here, an Investigator has successfully persuaded a party to act contrary to the advice of counsel by including a certain proposal in its final offer and where, as here, counsel is thereafter absent at the time the investigation would otherwise appropriately be ripe for closure, the Investigator is obligated as a matter of public policy to either (1) advise the District's remaining representatives to wait for counsel's return so that the content of the District's offer could again be reviewed or (2) to insist that the District reconsider the wisdom of following the Investigator's earlier suggestion concerning the contents of the District's final offer. After the Investigator acted in the role of advocate in an effort to enhance the possibility of settlement, the District asserts that the Investigator was duty bound to affirmatively renounce the advocate role before he could appropriately, as a mediator/investigator, close the investigation after his settlement effort has been unsuccessful.

Factually, it is undisputed that the Investigator had successfully persuaded the District to include a "liquidated damages" clause in its offer to the Association on the basis that the risk to the Association of proceeding to arbitration would be increased, thereby enhancing the prospect for a voluntary settlement. The District's legal counsel had advised the District against including the proposal. In the midst of the investigation on August 28, the District's legal counsel was called away from the meeting at a time when the Investigator was in the Association's caucus. The Investigator's September 8 letter to District's legal counsel (with which the District takes no factual issue) recites what happened then:

When I returned to the Board's caucus and discovered that you were absent, I asked the District Administrator and the Board President if they wanted me to wait until you returned before I proceeded with the investigation. Both said they didn't believe that was necessary inasmuch as the Board was not going to modify its offer. I then asked the District Administrator if he would authorize me to close the investigation and he indicated, in the presence of the Board President, that it was appropriate for the Board President to do that. The Board President then authorized me in writing to close the investigation and I proceeded to do so as evidenced by the "Report to Commission and Notice of Close of Investigation," which I gave to Messrs. Thomas Bina and Warren Johnson.

Having reviewed the matter, we do not believe that the Investigator's closure of the investigation was inappropriate. Having been told the District did not wish to wait for counsel to return before closing the investigation and having no knowledge as to how long counsel would be absent, closure in counsel's absence was permissible. Public policy does not require that the District be affirmatively instructed by the Investigator to reconsider the wisdom of following the Investigator's earlier suggestion or to consult the legal counsel whose advice had already been received earlier that day. While the District could certainly have

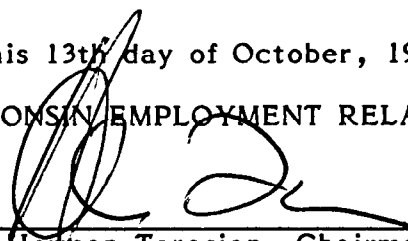
accepted the Investigator's offer to wait for counsel's return, it did not, and it subsequently voluntarily consented to the close of the investigation. Given these circumstances, we have denied the District's Motion.

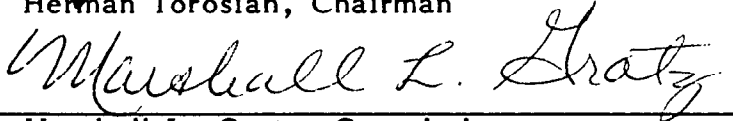
An order initiating mediation-arbitration will be issued under separate cover.

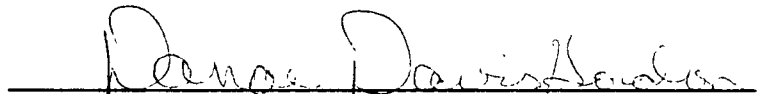
Dated at Madison, Wisconsin this 13th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner