STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSISTANTS ASSOCIATION,	:	
Complainant,	:	Case 114 No. 40634 MP-2102
vs.	:	Decision No. 25628-A
RACINE UNIFIED SCHOOL DISTRICT,	:	
Respondent.	:	

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Racine Education Assistants Association.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Thomas R. Crone, 119 Martin Luther King, Jr. Blvd., P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine Education Assistants Association having, on May 26, 1988, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act by refusing to bargain in good faith; and the Commission having, on August 17, 1988, 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, on November 22, 1988, submitted a stipulation of the record in lieu of hearing in the matter; and the parties having completed the filing of briefs on January 20, 1989; 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 Racine Education Assistants Association, hereinafter referred to as the REAA, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the certified exclusive bargaining representative of a bargaining unit consisting of the District's teacher and clerical aides excluding supervisors and employes of other bargaining units; and that its offices are c/o George Hahner, 701 Grand Avenue, Racine, Wisconsin 53403.

2. That the Racine Unified School District, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. and its principal offices are located at 2220 Northwestern Avenue, Racine, Wisconsin 53404; and that Frank Johnson is the District's Director of Employee Relations and has acted as its representative.

3. That the REAA and the District have been parties to a series of collective bargaining agreements, the most recent covering the 1985-86 and 1986-87 school years; and that prior to September 21, 1987, the parties commenced negotiations for the 1987-88 school year.

4. That on September 21, 1987, the REAA, at a regular membership meeting, voted to affiliate with the Wisconsin Education Association Council and to enter into a UniServ relationship with the Racine Education Association; that the vote was 117 to 24 in favor of the affiliation; and that the District employed approximately 320 aides during the 1987-88 school year.

5. That on September 28, 1987, the District filed a petition for election with the Commission and on October 9, 1987 filed a petition for declaratory ruling both of which raised questions as to the voting procedures on the affiliation and whether the identity of the representative had changed.

6. That in October, 1987, after the affiliation vote, the District and REAA held a bargaining session, at the conclusion of which, the REAA stated it would be filing a petition for Interest Arbitration; and that on October 30, 1987, the REAA filed said petition.

7. That on or about November 23, 1987, a staff mediator appointed by the Commission to make an investigation to determine whether arbitration should be commenced, contacted Frank Johnson, the District's representative, and indicated knowledge of the election petition and the petition for declaratory ruling; that after discussion with Johnson, the mediator decided not to schedule a meeting with the parties; and that on January 15, 1988, the mediator again contacted Johnson who indicated that the District was unwilling to meet until the petition for election and for declaratory ruling were resolved.

8. That by a letter dated January 26, 1988, to Robert K. Weber, the Attorney for the REAA, the mediator stated as follows in reference to the petition for Interest Arbitration:

> The District has informed me it is unwilling to engage in mediation until the identify of the bargaining representative is resolved. Consequently, the mediation in this case will be held in abeyance until after the February 5, 1988 representation hearing.
>
> I request that the Association, as the Petitioner, contact me after the February 5 hearing to inform me of the status of that case and, if appropriate, suggest dates for the mediation.;

and that there was no request made by the REAA to the District or to the mediator to resume negotiations/mediation from Novemebr 1987 until May 1988, at which time the instant complaint was filed.

9. That in June, 1988, after the District was made aware of the complaint, it advised the REAA that it was willing to resume negotiations/mediation notwithstanding that the petitions for election and declaratory ruling were still pending; and that the parties subsequently met with the investigator/mediator.

10. That on December 22, 1988, the Commission dismissed the District's petition for election on the basis that the affiliation vote satisfied due process requirements and the affiliation did not cause any significant changes in the REAA and the District failed to demonstrate that it had a reasonable basis based on objective considerations to believe that the REAA did not continue to represent a majority of the employes in the bargaining unit; and that the Commission on December 22, 1988 dismissed the petition for declaratory ruling on the grounds that the election petition dismissal resolved the same issues in the petition for a declaratory ruling.

11. That the REAA's failure to make a request to either the District or to the mediator after the filing of its petition for Interest Arbitration and the mediator's letter of January 26, 1987 constitutes acquiescence in the delay in the resumption of negotiations and/or mediation.

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

CONCLUSION OF LAW

1. That the Respondent, Racine Unified School District, did not refuse to bargain in good faith with the Racine Education Assistants Association and did not commit 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/

That the complaint filed in the instant matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 20th day of February, 1989.

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the REAA alleged that the District violated Sec. 111.70(3)(a)4, Stats. by refusing to bargain in good faith with the REAA from October 1987 to May, 1988 on the basis of the District's petition for election which was not based on a good faith doubt as to the representative status of the REAA. The District answered said complaint denying that it refused to bargain in good faith and alleging that the affiliation vote was not proper and the affiliation vote raised a question concerning representation. The District also asserted that the REAA consented to any cessation of bargaining and the District had affirmatively stated its willingness to bargain subsequent to October 1987. The District asked that the complaint be dismissed.

REAA's POSITION

The REAA contends that the District's refusal to bargain with it constituted a per se violation of Sec. 111.70(3)(a)4, Stats. The REAA argues that because the District lacked reasonable cause to believe that the incumbent organization had lost its identity as the representative of the majority of employes and that minimal procedural standards for the affiliation vote were observed, it follows that the District lacked a good faith reason to terminate negotiations and committed a technical violation of Sec. 111.70(3)(a)4, Stats. The Association claims that an employer violates its duty to bargain when it refuses to bargain with a post-affiliation Union which is a continuation of the preaffiliation union. It submits that an employer's termination of negotiations, even if upon mistaken facts or an erroneous interpretation of case law, violates its duty to bargain in good faith.

The REAA claims that if the Examiner rejects a per se violation analysis, the District lacked objective evidence of a good faith doubt as to the identity of the bargaining representative or that REAA failed to observe minimal due process standards in the affiliation. The REAA insists that the evidence establishes that the District lacked a good faith doubt as to the identity of the bargaining representative. It points out that the District elected to resume negotiations with the REAA in June, 1988 without an explanation of its refusal to engage in mediation for eight months and its resumption indicates it had no legitimate reason for refusing to mediate before that time. The REAA contends that the District's sketchy and minimal information on the affiliation vote prior to its speedy filing of the election petition indicates that it was more interested in contesting the affliation vote than in bargaining in good faith with the REAA. It also asserts that the information on which the District filed its petition for a declaratory ruling leads to the same conclusion. The REAA contends that the District's presentation of its case in the election petition hearing manifests that its petition had no merit and serves to illustrate what a shallow case it had.

The REAA asserts that it did not consent to the District's refusal to mediate and points out that it was the District that refused to meet with the mediator pending the disposition of the District's petitions for election and for a declaratory ruling. It notes that the District never indicated a willingness to meet and steadfastly prosecuted its cases on the petitions. It claims that the District's argument is frivolous and there was no consent to the District's recalcitrant conduct. It submits that it is obvious that the District had no intention of meeting with the mediator until it had delayed mediation for a sufficient time to punish employes for their affiliation vote. It concludes that the District's conduct was in bad faith. It requests that appropriate relief be granted for the District's improper conduct including a cease and desist order, the posting of a notice that it will not refuse to bargain in good faith in the future, interest at the statutory rate on the backpay monies for employes due to the eight month delay, as well as attorneys fees because the District's case was "frivolous" rather than "debatable".

DISTRICT'S POSITION

The District contends that it had no duty to bargain with the REAA where the affiliation was improper. It asserts that the affliation in the instant case did not satisfy the requirements of due process and thus the District had no obligation to continue to bargain with the REAA. The District further contends that the affiliation raised a good faith doubt as to the identity of the employes' bargaining representative. According to the District, even if there were insufficient factors to support a finding of a change in bargaining representative, those factors present were sufficient to raise a good faith doubt as to the identity of the bargaining representative.

The District argues that the suspension of negotiations pending resolution of the election and declaratory ruling petitions was with the REAA's consent. It submits that the District simply concurred with the mediator that the parties couldn't meet until after the other cases were resolved. It points out that the mediator requested the REAA to contact the mediator regarding resumption of negotiations and the REAA did nothing to indicate it did not concur with the mediator's position until it filed the instant complaint in May, 1988, and when the District was advised of the complaint, it offered to return to the table. Under these circumstances, the District maintains that there is no basis for a finding that it refused to bargain. The District claims that up until the filing of the complaint it legitimately assumed that the REAA shared its view that negotiations were best suspended until the election and declaratory petitions were decided and once it was advised to the contrary, it offered to and did resume negotiations, and therefore, there was no unlawful refusal to bargain.

The District asserts that even if a violation of the act is found, the relief sought by REAA is inappropriate. It claims than an order to bargain is inappropriate where bargaining has already resumed. It submits that interest on a yet undetermined wage increase has never been ordered by the Commission and where the amount is uncertain, interest is inappropriate and the facts here provide no basis for such extraordinary relief. The District insists that there is no basis for recovery of attorneys fees.

The District concludes that the complaint is without merit and asks that it be dismissed.

DISCUSSION

It should be noted that the parties filed their initial briefs in this matter before the Commission issued its decision dismissing the petitions for election and for a declaratory ruling. Thus, the District's arguments that the affiliation was improper because it did not satisfy the standards of due process and the change in the identity of the bargaining representative have been decided by the Commission in the dismissal of the District's petition for an election. The District's assertion that there were sufficient factors to raise a good faith doubt as to the identity of the representative so as to excuse its suspension of negotiations while the case was pending before the Commission is not persuasive. The Commission in the election petition dismissal stated as follows:

> The testimony presented by the District herein falls far short of the 'objective considerations' necessary for the District to possess a reasonable belief that the REAA had lost its majority status." 2/

Therefore, it appears that the District cannot excuse its suspension of negotiations on that factor pending the outcome of the petitions. With respect to the procedural safeguards for the affiliation vote, it appears that the District's claims were at least colorable and that the filing of the petition on that basis would preclude a finding of bad faith filing of the petition to thwart bargaining. Arguably the information available to the District on the vote was sketchy at best and further investigation could have been done. This alone while indicative of a lack of good faith is not sufficient to establish bad faith. 3/

2/ Racine Unified School District, Dec. No. 10095-B (WERC, 12/88) at n. 16.

3/ Milwaukee Board of School Directors, Dec. No.23495-A (Crowley, 5/88), aff'd by operation of Law, Dec. No. 23495-B, (WERC, 6/88).

Prior to ascertaining whether the District refused to bargain in good faith by delaying negotiations or whether the District could show a substantial reason for the delay, it is necessary to first determine whether or not the District did in fact refuse to bargain with the REAA.

First, it should be noted that the District and the REAA held a negotiation session after the filing of the election petition at the end of which the REAA indicated that it would file a petition for Interest Arbitration, which it did on October 30, 1987. This indicates a willingness to continue bargaining even though the petitions were pending and certainly cannot be construed as a refusal to bargain when bargaining actually occurs. There were delays in negotiation after October 30, 1987. Where both parties are dilatory or where the parties agree to await the outcome of the Commissions rulings, bad faith bargaining will not be found. 4/ There is no evidence that after October 30, 1987, the REAA asked or demanded either the District or the mediator to meet in either negotiations or mediation. The REAA stipulated that Frank Johnson would testify if called as to his conversation with the mediator but the REAA would not stipulate as to the truth of this testimony or to the materiality or admissability of said statements. Assuming arguendo that they are not admissible, then there is no evidence that a meeting was not scheduled except by the decision of the mediator and there would be no direct refusal to meet on the part of the District. Assuming his statements are admitted as true, then it again would appear that there is no direct refusal to meet but merely agreement with the mediator not to meet. The January 26, 1988 letter from the mediator indicates an unwillingness, not a refusal, on the part of the District to meet and a request to the REAA to contact the mediator after February 5, 1988. REAA never contacted the mediator or the District until the filing of the instant complaint at which time the District indicated it would negotiate/mediate with the REAA. The record set out above fails to establish that the District directly refused a demand to bargain. There is no evidence that the REAA ever made known any opposition to the delay in negotiations. Given this record, the evidence leads to the conclusion that the REAA acquiesced in the delay. There is no evidence of any contact with the mediator or District with a request for prompt mediation or an objection to any delay. It did not urge or insist or make any effort to make known its desire for prompt mediation. This conduct, coupled with no direct refusal to the REAA but a mere expressed unwillingness relayed to the mediator, falls short of establishing that the District refused to bargain. The District may have merely agreed with the mediator who might have gotten the same response from the REAA. Thus, it is concluded that there was insufficient evidence of the District's refusal to bargain with the REAA. Additionally, it agreed to and did bargain after the petitions were filed and again when the complaint was brought to its attention. Had the REAA made known its objection to any delay or insisted on negotiations, any delay would then be due to the District's conduct. The REAA inaction implies acquiescence in the delay. 5/ Based on the evidence, it is concluded that the District did not refuse to bargain and the REAA acquiesced in any delay in negotiations, and therefore, the complaint has been dismissed.

Dated at Madison, Wisconsin this 20th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley, Examiner

4/ City of Janesville, Dec. No. 22991-A (Honeyman, 3/86) aff'd by operation of law, Dec. No. 22981-B (WERC, 4/86); Milwaukee Board of School Directors, Dec. Nos. 17309-B, 17310-B (Rothstein, 3/81), aff'd by operation of law Dec. Nos. 17309-C, 17310-C (WERC, 4/81).

5/ Compare the facts here with those in Milwaukee Board of School Directors, Dec. Nos. 17309-B, 17310-B (Rothstein, 3/81) aff'd by operation of law, Dec. Nos. 17309-C, 17310-C (WERC, 4/81) where the Examiner stated: "If the Board had also agreed to await the outcome of the Commissions ruling, clearly, the Association's posture would have been defensible. However, the Board emphatically urged the Association to continue to negotiate the issues which were not in question.