STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN DELLS SCHOOL DISTRICT EMPLOYEES UNION, LOCAL 1401-A, AFSCME, AFL-CIO,	
Complainant,	Case 21 No. 41771 MP-2197
vs.	Decision No. 25997-C
WISCONSIN DELLS SCHOOL DISTRICT,	
Respondent.	

Appearances:
Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Elhke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, for the Complainant.
Mr. Karl L. Monson, Consultant, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703, for the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner David E. Shaw having on April 5, 1990 issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he found Respondent Wisconsin Dells School District to have committed certain prohibited practices within the meaning of Secs. 111.70(3)(a)4, 5 and 1, Stats. and wherein he denied Complainant's request for attorney fees and costs; and Complainant having timely filed a petition with the Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. seeking review of the Examiner's denial of the request for attorney fees and costs; and the parties thereafter having filed written argument in support of and in opposition to the petition, the last of which was received June 4, 1990; and the Commission having reviewed the record and argument and being satisfied that the Examiner's decision should be affirmed;

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order issued in the above matter are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

1/ Found on page two.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An

agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER
AFFIRMING EXAMINER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

THE EXAMINER'S DECISION

In his decision the Examiner made the following pertinent Conclusions of Law as to the Complainant's allegations:

> 2. That by unilaterally deciding to discontinue, and then discontinuing the practice of providing the free hot lunch benefit for its cooks and the one secretary at the start of its 1988-1989 school year, without first bargaining that decision with the Complainant, and by refusing to reinstate that benefit, the Respondent Wisconsin Dells School District, its officers and agents, have refused to bargain collectively with Complainant in violation of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.
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> 3. That by failing and refusing to reinstate the practice of providing the free hot lunch benefit after having agreed that it would be reinstated, and after the parties had reached agreement on and ratified their Collective Bargaining Agreement, the Respondent Wisconsin Dells School District, its officers and agents, violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.
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> 4. That by failing and refusing to pay the equivalent of 85% of the monthly premium for the family group health insurance plan and the equivalent of 100% of the monthly premium for the single group health insurance plan for the first year of their Agreement, as required by Article 12 - Insurance and Retirement, Section 12.01, of the parties' Agreement, the Respondent Wisconsin Dells School District, its officers and agents, violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.
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> 5. That by failing to provide its employes represented by Complainant with the option of being covered by the agreed upon disability insurance coverage as required by Article 12 - Insurance and Retirement, Section 12.05, of the parties' Agreement, within a reasonable time after the Agreement was ratified, the Respondent Wisconsin Dells School District, its officers and agents, violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.
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> 6. That by making its proposal of June 2, 1988, which nullified its proposal of May 16, 1988, the Respondent Wisconsin Dells School District, its officers and agents, did not refuse to bargain collectively in violation of Sec. 111.70(3)(a)4, Stats.

The Examiner ordered Respondent to take certain actions to remedy the violations. As to Complainant's request for attorney fees and costs, the Examiner denied same and held:

> Besides requesting a cease and desist order and make whole relief, the Complainant also asks that it be awarded costs and attorneys fees. The Commission has held that such relief is available "only where a litigant's position demonstrates extraordinary bad faith." 16/ The Respondent has successfully defended against one of the charges, and while the Respondent's conduct certainly has contributed to a lack of trust in its relationship and dealings with the Complainant, it does not rise to the level of "extraordinary bad faith" so as to merit the award of costs and attorneys fees. Therefore, it has been concluded that the cease and desist order and the affirmative relief order will adequately remedy the violations found to have been committed by the Respondent.

16/ Hayward Community School District, Dec. No. 24259-B (WERC, 3/88), at page 5.

PETITION FOR REVIEW

No petition for review was filed by Respondent. Complainant filed a petition for review as to the Examiner's denial of the request for attorney fees and costs.

POSITIONS OF THE PARTIES

Complainant

Citing Hayward Community School District Dec. No. 24259-B (WERC, 3/88), Complainant argues that Respondent's conduct during the course of the instant litigation establishes the "extraordinary bad faith" necessary for receipt of attorney fees and costs. Complainant contends that although represented by an experienced consultant, Respondent's untimely answer admitted the material factual allegations set forth in the complaint; Respondent failed at hearing to participate in settlement discussions or to offer evidence which disputed the material facts in the case; and Respondent failed to raise any legally recognizable argument in defense of its actions.

Complainant asserts that Respondent engaged in and admitted the following conduct which breached some of the most well-settled propositions of labor law.

> (1) The unilateral discontinuation of an established condition of employment while negotiations are pending is unlawful.
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> (2) When a party engaged in the negotiation of a collective bargaining agreement repeatedly asserts, at the bargaining table, that language it is proposing has a certain meaning, it will not later be heard to deny that the language has the meaning asserted.
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> (3) When one party has agreed by contract to do a particular thing--proved a particular benefit, upon the occurrence of a certain event, it will be required to do that thing--provide that benefit, when the certain event occurs.

Complainant asserts that if the foregoing totality of the District's conduct does not demonstrate the requisite "extraordinary bad faith", then the Commission's standard has no meaning and does not serve to discourage frivolous conduct.

Respondent

Respondent urges the Commission to affirm the Examiner's denial of Complainant's request for attorney fees and costs. Respondent argues that it raised legal defenses to all of the allegations made by Complainant and notes that the Examiner found merit to certain of these defenses when he dismissed one of Complainant's allegations. Respondent also cites numerous decisions by Commission Examiners denying requests for attorney fees and costs.

DISCUSSION

As the Examiner correctly held, where a party's position is found to demonstrate "extraordinary bad faith", attorney fees and costs are available from the Commission. Hayward Schools, supra. In his concurring opinion in Madison School District, Dec. No. 16471-D (WERC, 5/81), Commissioner Torosian more fully stated our present view on the general availability of attorney fees and on how the "extraordinary bad faith" test can be met. He held:

> While I concur with the majority that attorney fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National

> Labor Relations Board stated its intention ". . . to refrain from assessing litigation expenses against a respondent, not-withstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."
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> In my opinion limiting the granting of attorney fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging frivolous litigation and to protect the integrity of our process. (Emphasis added.)

In his decision, the Examiner aptly summarized the Respondent's defenses in this litigation as follows:

> Respondent
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> With regard to an alleged violation of Sec. 111.70(3)(a)1, Stats., the Respondent asserts that the allegation is that the violation occurred as a result of the Respondent's announcing its intention to discontinue the free lunch benefit and subsequently terminating the program. The Respondent cites Commission case law as holding that in order to prevail on a complaint of interference under MERA, the Complainant must demonstrate by "a clear and satisfactory preponderance of the evidence" that the actions complained of were likely to interfere with employe rights and that although a finding of intent is not necessary to find interference, it must be demonstrated that the act complained of contains a "threat of reprisal or promise of benefit" which would tend to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats. Citing, Lisbon-Pewaukee Joint School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Brown County, Dec. No. 17258-A (Houlihan, 8/80). The Respondent also cites the Commission's decision in Milwaukee Public Schools, Dec. No. 20005-B (WERC, 2/84) where the Commission held with regard to alleged interference, "MERA was not enacted to grant the WERC an unlimited authority to generally oversee an employer's employment relations decisions." The Respondent denies that its actions interfered, restrained or coerced the employes in the exercise of their rights as municipal employes.
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> The Respondent asserts that as to an alleged violation of Sec. 111.70(3)(a)4, Stats., there cannot be a refusal to bargain when there has been no demand to bargain. It asserts that the record is clear that there was no demand to bargain in this case, nor was there ever a refusal to bargain by the Respondent at any time. The issue apparently arose in the eyes of the Complainant when the Respondent advised the cooks that the free lunch was being discontinued as a means to ameliorate the deficit being created in the food service department. According to the Respondent, its decision was based on "obvious business analysis and business conclusion" and this constitutes the defense of "business necessity". The Respondent also asserts that after becoming aware of the Respondent's intention to discontinue the benefit, the Complainant failed to demand to bargain over the issue. According to Respondent, this constitutes the defense of "waiver". The Respondent cites Commission decisions regarding the need to maintain the status quo and holding that determinations in that regard are made on a case-by-case basis after examining the parties' contract language, past practice and bargaining history. The Respondent also cites the Commissions's decision in Milwaukee Board of School Directors, Dec. No. 15197-B, 15203-A, (Yaeger, 12/81) as holding that the duty to bargain requires the parties to meet and confer at reasonable times and that undue delays between bargaining sessions may also violate the duty to bargain, but such delays do not constitute a per se violation as they may be excused by a showing of good

faith or sound business reasons. It is asserted that the Complainant eventually filed a grievance in this matter, but that it did not do so until after the parties had ratified their agreement. Respondent alleges that the Board ratified the agreement in December of 1988 and that the initial notice of its intent to end the free lunch program was in August of 1988. There is no evidence to explain why the Complainant never brought the issue to the bargaining table during that time.

As to the alleged breach of contract violations, the Respondent first asserts that it received the estimate for the single and family group health insurance premium costs from the WEAIT representative as of March 14, 1988 and utilized those estimated amounts in computing the 85% and 100% figures that were included in the labor agreement ratified by both parties. It asserts that the final figures were received by the Respondent on August 29, 1988 with an effective date of coverage of October 1, 1988, and asserts that since the premiums are paid the month immediately prior to the month for which the coverage is in effect, September 1988 in this case, the employees were aware of any payroll deductions which were necessary. The Respondent compares the amounts included in the parties' agreement with 100% and 85% of the actual premium costs, and asserts that while they are not the same, the express language of the agreement speaks for itself and asserts that if the Complainant found those numbers unacceptable, they should have raised the issue at the bargaining table or not ratified the agreement. With regard to the disability income continuation insurance, the Respondent asserts that both parties ratified this provision based on the belief that the Respondent would be able to obtain the same coverage as it provided for its teachers; however, WEAIT informed Respondent that it could not obtain the same coverage as was provided the teachers. Peterson informed the Complainant of this and immediately began a search for another carrier. Rodenstein advised Peterson that "we would give them some latitude, but that he needed to do this as soon as possible." Rodenstein told that to Peterson in January or February and it was some months before the Respondent was able to arrange the coverage, however, while Complainant claims coverage should have been provided sooner, it has never specified how much sooner. The Respondent asserts as a defense that the conditions under which the parties reached agreement on disability income continuation insurance changed through the fault of neither party. The Respondent informed the Complainant of the progress in the search for a carrier and encouraged Rodenstein to contact the WEAIT representative to help expedite matters. The Respondent asserts that it "worked diligently in trying to find disability insurance and it was only because of the literal unavailability of such coverage for a period of time that it took as long as it did to obtain the coverage." Hence, it was not the intentional conduct of the Respondent that caused the delay in implementing the disability insurance, rather, it was a matter of the physical impossibility of obtaining such insurance.

With regard to the alleged violation of Sec. 111.70(3)(a)4, Stats., based on Respondent's June 2, 1988 proposal, the Respondent asserts that the evidence does not support a finding of bad faith bargaining on the part of the Respondent. It asserts that the May 16, 1988 proposal from Respondent was the result of a meeting of certain Board members and the June 2, 1988 proposal was the result of a meeting of different Board members, with the latter meeting resulting in the earlier proposal being overturned. Respondent asserts that this is "a completely legitimate exercise of school board authority." It is also contended that since the Complainant did not communicate in any form with Respondent after receiving the May 16, 1988 proposal, there were no tentative agreements known to be reached as a result of that proposal. Further, before any tentative agreements were reached, the Respondent's June 2, 1988 proposal

> was issued which rendered the earlier proposal "null and void." Since no agreements were reached based on the May 16, 1988 proposal, the Complainant was not prejudiced by the proposal being rendered null and void. According to the Respondent, the "totality of conduct" theory also does not support a finding of bad faith bargaining.

As the above quoted portion of our Madison Schools decision reflects, our test for the availability of attorney fees is strict. Only in the "exceptional" case is such an "extraordinary remedy" warranted. Here, the Examiner correctly found certain Respondent conduct violated the Municipal Employment Relations Act. In our view, Respondent's misconduct, particularly as to the refusal to reinstate the free lunch benefit, can reasonably be viewed as "clearly aggravated". However, our test does not focus on the degree of misconduct ultimately found to have occurred but rather on whether the defenses raised were "debatable" as opposed to "frivolous".

We have reviewed the record herein and concluded that the defenses raised by Respondent were at least "debatable" and, as reflected in Examiner's Conclusion of Law 6, were found persuasive by the Examiner as to one of Complainant's allegations. Thus, we affirm the Examiner's denial of attorney fees and costs.

Dated at Madison, Wisconsin this 3rd day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner