STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION,	:	
Complainant,	:	
	:	Case 124
vs.	:	No. 46240 MP-2522
	:	Decision No. 27064-C
RACINE UNIFIED SCHOOL DISTRICT,	:	
Respondent.	:	
RACINE UNIFIED SCHOOL DISTRICT,	:	
Complainant,	:	
	:	Case 125
vs.	:	No. 46411 MP-2533
	:	Decision No. 27079-C
RACINE EDUCATION ASSOCIATION,	:	
Respondent.	:	

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert K. Weber, 514 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the Association.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Ms. JoAnn M. Hart, 119 Martin Luther King, Jr. Blvd., P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the District.

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

On August 6, 1992, Examiner Karen J. Mawhinney issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matters wherein she

concluded that the Racine Unified School District had violated Sec. 111.70(3)(a)5, Stats., by refusing to proceed to arbitration and that the Racine Education Association had not violated Sec. 111.70(3)(b)4, Stats., by filing certain grievances at the second step of the parties' contractual grievance procedure. On August 26, 1992, the District filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decisions pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument, the last of which was received on November 3, 1992. Having considered the record and the parties' arguments, the Commission makes and issues the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin

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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.

(continued)

this 30th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
A. Henry Hempe, Chairperson

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

1/ (continued)

(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.

1/ (continued)

(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.

RACINE UNIFIED SCHOOL DISTRICT

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

Before the Examiner, the Racine Education Association argued that the Racine Unified School District had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to proceed to arbitration as to three grievances. The Racine Unified School District argued that the Racine Education Association had committed a prohibited practice within the meaning of Sec. 111.70(3)(b)4, Stats., by failing to file certain grievances at the appropriate step of the contractual grievance procedure.

The Examiner's Decision

In her decision, the Examiner reasoned as follows:

> When confronted with questions of arbitrability, the Commission has long relied on the well-settled law enunciated by the U.S. Supreme Court in the Steel-workers 1/ and applied to the Municipal Employment Relations Act by the Wisconsin Supreme Court, 2/ where the Court ruled that arbitration will be ordered unless it can be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. The Commission has consistently held that a party has a right to proceed to arbitration when it makes a claim which on its face is governed by the collective bargaining agreement. 3/

1/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

2/ Jt. School District No. 10 v. Jefferson Education Ass'n., 78 Wis.2d 94 (1977).

3/ State of Wisconsin, Dec. No. 18012-C (WERC, 11/81).

The District has not cited any provision of the bargaining agreement which would exclude the grievances in dispute from arbitration. The District has only objected to the grievances being filed at Level Two instead of Level One. This is a classic procedural arbitrability question and is clearly one for the arbi-trators. The point need not be belabored -- the District's refusal to proceed to arbitration violates Sec. 111.70(3)(a)5, and it must proceed to arbitration with grievances 48-91, 55-91 and 58-91.

The District has complained that the Association is continuously violating the bargaining agreement by filing grievances at Level Two when they should be filed at Level One. The District attempts to force the Examiner to look at the merits of the procedural arbitrability defense in order to rule on its complaint. The determination of whether the grievances cited by the District were properly filed at Level Two is a matter for the arbitrators. In Milwaukee Board of School Directors, 4/ the Examiner found an exception to the Commission's deferral policy where the dispute had caused a breakdown in the grievance procedure itself. In this case, there is no need to carve out a similar exception, because the District has failed to conclusively demonstrate that there is a breakdown in the grievance procedure or that the Association's conduct has fundamentally altered the grievance procedure in a manner to warrant such an exception. The Association has filed hundreds of grievances, many of them at Level One. The Association has on occasion acquiesced with the District's demand that it resubmit a grievance to Level One when it was originally filed at Level Two. The District is not without a remedy, if indeed it is correct that certain grievances were improperly filed at the wrong step. It has not waived any defenses available to it in arbitration.

The Examiner has considered all the arguments of the parties, and finds that the District's refusal to submit grievances 48-91, 55-91 and 58-91 to arbitration violates Sec. 111.70(3)(a)5, and that the District's complaint is without merit, inasmuch as it

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4/ Dec. No. 12028-A (Fleischli, 5/74), aff'd by operation of law, Dec. No. 12028-B (WERC, 9/74).

> would be inappropriate for the Examiner to determine whether the three grievances named above as well as four others cited by the District were filed at the correct level or not. The policy reasons raised by the District have been rejected, as the better policy is for the arbitration process to be allowed to work. Accordingly, the Examiner has ordered the District to strike arbitrators for grievances 48-91, 55-91 and 58-91 and has dismissed the District's complaint.

The Positions of the Parties

The District contends that the Examiner erred by dismissing the District's complaint and by finding that the District violated Sec. 111.70(3)(a)5, Stats., by refusing to select an arbitrator as to three of the grievances at issue herein. The District contends that the Examiner erroneously concluded that the District had a remedy for its complaint of contract violation because it might be able to raise a procedural defense in grievance arbitration to the effect that the grievances had been filed at the wrong step. In this regard, the District notes that several of the grievances in dispute are not proceeding to arbitration and that the District has no independent right to compel arbitration as to these disputes. The District further asserts that the Examiner failed to recognize that the ability to assert a procedural defense to an individual grievance is not a remedy to a statutory claim that the Association has violated the parties' collective bargaining agreement.

As further support for its view that the Commission must reach the merits of the District's breach of contract claim, the District argues that the Association's conduct herein raises issues as to the overall function and integrity of the parties' grievance procedure. Citing Milwaukee Board of School Directors, Dec. No. 12028-A, (Fleischli, 5/74), aff'd by operation of law, Dec. No. 12028-B (WERC, 9/74) the District contends that where the overall operation of a grievance procedure is in dispute, exercise of Commission jurisdiction effectuates the policy of encouraging peaceful settlement of disputes.

As to the merits of its contractual claim, the District contends that the record clearly establishes that the grievances in question have been improperly filed at the second step of the parties' grievance procedure. Therefore, the District contends that it is clear the Association has violated Sec. 111.70(3)(b)4, Stats.

Given all of the foregoing, the District asks that the Association's complaint be dismissed, and that the Commission find that the Association has violated Sec. 111.70(3)(b)4, Stats.

The Association urges the Commission to affirm the Examiner. The Association asserts that the Commission must not allow the District to delay the grievance arbitration process by obtaining a ruling on the procedural arbitrability defense which the District has raised. The Association contends that the question of whether the grievances were properly filed is and should be a matter for the grievance arbitrator to decide. While asserting that there will occasionally be disagreements as to whether a grievance has been filed at the proper step, the Association alleges

that the dispute in question falls far short of any alleged breakdown in the operation of the grievance procedure, as argued by the District. The Association asserts that disputes as to whether grievances have been properly filed are precisely the type of disputes which arbitration should resolve in a fair and prompt fashion.

Given the foregoing, the Association asks the Commission to affirm the Examiner.

Discussion

Looking first at the Examiner's determination that the District violated Sec. 111.70(3)(a)5, Stats., by refusing to strike arbitrators, we affirm the Examiner. As she held, unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, the party is entitled to proceed to arbitration. 2/

Turning to the focal point of the District's contentions herein, we affirm the Examiner's dismissal of the District's violation of contract claim although for a somewhat different rationale than expressed by the Examiner. Contrary to the Examiner's reasoning, we do not believe that the District's violation of contract claim can be denied based upon Commission deferral policy. As argued by the District, the District has no independent right to proceed to arbitration as to its breach

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2/ Jt. School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1977).

of contract claim. 3/ Thus, there is no arbitral forum which can resolve the merits of the District's breach of contract claim. 4/ The District also persuasively argues that the

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3/ In Communication Workers of America and C & P Telephone, 280 NLRB 78 (1986), the National Labor Relations Board cited the employer's inability to compel arbitration as one of the reasons it decided to resolve an employer's Section 8(d) claim.

4/ For that same reason, we do not find Milwaukee Schools, supra, applicable to this case. Milwaukee presented a situation in which the Commission was asked by a party to exercise its breach of contract jurisdiction over a dispute as to which the party also had clear access to the grievance arbitration procedure. Because the dispute involved the breakdown of the grievance procedure itself, it was concluded in Milwaukee that it was appropriate to make an exception to the Commission's general deferral policy. Here, deferral is not the issue because the District does not have independent access to grievance arbitration.

scope of the alleged breach of contract alleged in its complaint is broader than the three grievances which the Association wishes to arbitrate. Thus, the arbitration process will not in any way determine whether the Association improperly filed these other grievances at the wrong step. Further, the District correctly notes that even as to the grievances which the Association wishes to arbitrate, an arbitrator is not generally empowered to grant the District any affirmative relief even if the arbitrator concludes that the Association improperly filed those three grievances. For all of those reasons, we conclude that the District is entitled to an answer as to whether the Association violated Sec. 111.70(3)(b)4, Stats.

In State of Wisconsin, Dec. No. 22320-B (WERC, 7/86) aff'd Case No. 86-CV-4140 (CirCt Dane, 5/87), we were confronted with the question of whether a union violates a collective bargaining agreement when it files a grievance in an untimely manner. We therein concluded that nothing in that record warranted a conclusion that the parties to the contract intended grievance time limits to be independent contractual obligations such that an untimely grievance had the consequence of not only rendering unavailable a decision on the merits but also establishing a breach of contract by the union. Therefore, we concluded that no violation of contract occurred. We believe that the same conclusion is warranted here. Thus, even assuming that the grievances in question were improperly filed at the wrong grievance procedure step, we do not believe the record establishes that the parties intended the grievance procedure to impose independent contractual obligations such that improper filing has the consequence of not only rendering potentially unavailable a decision on the merits but also establishing a breach of contract by the union. Therefore, we conclude that no violation of contract should be found in this proceeding against the Association.

Given the foregoing, we have affirmed the Examiner's dismissal of the District's complaint as well as her decision and order that the District proceed to strike arbitrators.

Dated at Madison, Wisconsin this 30th day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
A. Henry Hempe, Chairperson

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner