STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,	:	
Complainant,	:	
	:	Case 265
vs.	:	No. 48234 MP-2655
	:	Decision No. 27545-A
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
Respondent.	:	

Appearances:

Perry, Lerner & Quindel, S.C., by Mr. Richard Perry, Esq., 823 North Cass Street, Milwaukee, Wisconsin, 53202, on behalf of the Complainant.

Mr. Grant Langley, City Attorney, by Ms. Mary M. Kuhnmuench, Assistant City Attorney, and Mr. Thomas Goeldner, Assistant City Attorney, Room 800, 200 East Wells Street, Milwaukee, Wisconsin, 53202, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Amedeo Greco: Hearing Examiner: Milwaukee Teachers' Education Association, herein "MTEA", filed a prohibited practices' complaint with the Wisconsin Employment Relations Commission, herein "Commission", on October 27, 1992, alleging that the Milwaukee Board of School Directors, herein "District", had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, herein "MERA", by unlawfully refusing to meet for the purpose of participating in two interest-arbitration proceedings. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusion of Law, and Order as provided for in Sec. 111.07(5), Wis. Stats. The District filed its answer on April 22, 1993, and hearing was held in Milwaukee,

Wisconsin, on April 22, 1993. The parties thereafter filed post-hearing briefs which were received by August 3, 1993.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. The MTEA - a labor organization which maintains its principal place of business in Milwaukee, Wisconsin - represents for collective bargaining purposes certain District employes, including a bargaining unit of approximately 15 accountants and bookkeepers and another bargaining unit of about 600 substitute teachers.

2. The District - a municipal employer which maintains its principal place of business in Milwaukee, Wisconsin - operates a public school system in Milwaukee, Wisconsin.

3. The MTEA and the District were privy to two separate collective bargaining agreements covering the accountants/bookkeepers and substitute teachers which expired on December 31, 1990.

4. The parties engaged in negotiations for successor collective bargaining agreements and petitions for interest-arbitration were subsequently filed with the Commission for both bargaining units. The parties were unable to reach voluntary agreement for either unit and the Commission subsequently certified that the parties were at impasse.

5. The parties thereafter notified the Commission in 1992 that they had selected arbitrator Richard J. Tyson to hear both disputes and the Commission in April and May, 1992, appointed arbitrator Tyson for both proceedings.

6. By letter dated April 22, 1992, 3/ to MTEA Assistant Executive Director Sam Carmen and District Labor Relations Representative Milton Ellis, arbitrator Tyson suggested hearing dates of May 22, June 5, the week of June 8, June 19, 26, and July 3.

7. By letter dated April 24, Carmen suggested to Ellis that he contact either himself or MTEA representative Barry Gilbert "with available dates so that we might schedule the hearing with Mr. Tyson." Ellis did not do so, and there apparently was no subsequent follow-up.

3/ Unless otherwise stated, all dates hereinafter refer to 1992.

8. By letter dated May 19, arbitrator Tyson informed Carmen and Ellis that he had not heard from them and asked whether the disputes had settled.

9. The parties between April - July conducted unsuccessful settlement discussions regarding both units. By letter dated July 16, District Labor Relations Specialist Deborah A. Ford informed Carmen, inter alia, that the District was rejecting MTEA's latest settlement offer and that "it seems appropriate that we meet at the earliest opportunity to discuss the scheduling of this matter."

10. On July 24 Carmen and Ford met and, inter alia, discussed selecting dates for the two arbitration cases before arbitrator Tyson, but they were unable to jointly agree on hearing dates. They then agreed that the then-pending interest-arbitration proceeding for the teacher aides should proceed to hearing before the accountants/bookkeepers and substitute teachers' arbitration cases. They also agreed that Ford would go back and check with District representatives regarding the availability for dates for the latter two proceedings.

11. By letter dated August 6, arbitrator Tyson suggested to Ellis and Carmen that the hearing for the accountants/bookkeepers and substitute teachers be scheduled for October 1-2.

12. By letter dated August 28, Ford informed arbitrator Tyson that there "has been some misunderstanding regarding available dates for the hearing"; that counsel for the District would not be available on October 1-2; and that counsel would be available on "the weeks of October 19-23" and November 2-6. She also stated that because of the unique issues in each unit, "separate hearings appear appropriate."

13. By letter dated September 9, arbitrator Tyson informed Ford, "I am somewhat concerned that we are moving very slowly" and suggested October 21-23 and November 2, 4 and 5 as hearing dates. The MTEA subsequently turned down the November 4 and 5 dates because its annual teachers' convention in Milwaukee, Wisconsin, was conducted on those dates. The record is unclear as to why the MTEA did not accept November 2 as a hearing date.

14. On September 18, Ford, Carmen, and several other

representatives met and discussed dates. There, Ford stated that the first available date would be December 16. Carmen objected to such a delay and asked if Ford could get additional help so that the hearing could be held sooner. A few weeks later, Carmen by letter dated October 2 again asked Ford for an earlier date and Ford subsequently replied that she would check into it. Carmen made a similar inquiry by letter dated October 20.

15. On September 10 and October 1, 2, 12, 16 and 20, District and MTEA representatives attended and participated in an interest-arbitration proceeding before arbitrator John C. Oestreicher involving the District's teacher aides. The parties chose not to schedule either the accountants/bookkeepers or substitute teachers' interest-arbitration proceedings on October 21-23 - as earlier suggested by the District and agreed to by Arbitrator Tyson - because they apparently did not want those proceedings to overlap with the just-concluded teacher aides' hearing.

16. By letter dated October 22, Carmen informed Ford:

> This letter will serve to restate my requests that we schedule the above captioned matters. I contacted you in late August to arrive at mutually convenient dates, you indicated that the city attorney's office was handling this matter and that you would need to get dates from that office. We met on September 18 and present at that meeting in addition to you and I were Cheryl Barczak and Barry Gilbert. You indicated that the first available date was December 16th, I strenuously objected, indicated that a further three months delay was unacceptable and asked that you request additional help if that be necessary.
>
> On or about October 2, I again inquired as to available earlier dates, you indicated that you had a meeting planned with Barbara Horton, shortly and would get back to me.
>
> On October 20th I again inquired and you indicated you were still working on it. These delays are unacceptable.

17. On October 27, the MTEA filed the instant prohibited practices' complaint with the Commission asserting that the District was unlawfully refusing to meet at reasonable times for the purpose of participating in the accountants/bookkeepers and substitute teachers' interest-arbitration proceedings.

18. The MTEA on November 3 and 4 filed two separate Motions to Compel Arbitration requesting the Commission to order the District to proceed to interest-arbitration in both cases within 45 days. The MTEA at that time also stated that it would be available to participate in interest-arbitration proceedings on any of the following dates: December 9, 10, 11, 14, 15, 16, and 17, 1992, and January 6, 7, 8, 11, 15, 18, 19, 20, 21, 22, 26, 28 and 29, 1993, along with the entire month of February with the exception of February 2, 1993.

19. Thereafter, Assistant City Attorney Mary M. Kuhnmuench - who represented the District in the teacher aides, accountants/bookkeepers, and substitute teachers' interest-arbitration cases - spoke by telephone with Attorney Barbara Zack-Quindel who represented the MTEA in those proceedings about scheduling the accountants/bookkeepers and substitute teachers' cases. Kuhnmuench and Quindel then agreed that no hearings should be scheduled during the last week of November because of the Thanksgiving holiday. In addition, both Kuhnmuench and Quindel then stated that they would be unavailable during certain weeks of 1992. Kuhnmuench at that time also suggested blocking out more dates than Arbitrator Tyson had offered because it was her experience that additional days were necessary to complete such interest-arbitration cases - a suggestion which Quindel accepted.

20. By letter dated November 12 to Quindel, Kuhnmuench codified her understanding by stating that she was available for the two arbitration proceedings on January 20, 21, 22, 25, 26 and 29 and "the first two weeks of February."

21. By letter dated November 16, Attorney Quindel informed Arbitrator Tyson that MTEA and District representatives had agreed to the following arbitration dates: January 20, 21, 22, 25, 26, and 29 and February 1, 2, 3, 5, 8, 9, 10, 11 and 12.

22. On November 23, the MTEA withdrew its Motions to Compel Arbitration.

23. The parties thereafter participated in an interest-arbitration hearing for the accountants/bookkeepers before Arbitrator Tyson on January 21, 22, and February 8, 1993, and in an interest-arbitration hearing for the substitute teachers before Arbitrator Tyson on February 9 and 18, 1993.

24. In addition to the accountants/bookkeepers and the substitute teachers, there are another 11 separate bargaining units among the District's approximately 13,000 employes. The MTEA also represents a teacher's unit which consists of about 6,500 employes and a unit consisting of teacher's aides which numbers about 2,100. The teachers' contract expired on June 30, 1992. The MTEA has twelve full-time professional staff members to service the four bargaining units it represents. The District has 3 full-time professional employes to handle its labor relations. In addition, the District uses the Milwaukee City Attorney's office to represent it in certain labor matters and it has retained attorney Michael Spector from Quarles and Brady to serve as its chief spokesperson in collective bargaining negotiations with the teachers and administrators.

Upon the basis of the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Respondent Milwaukee Board of School Directors did not violate Section 111.70(3)(a)4, Stats., by its conduct in scheduling the accountants/bookkeepers and substitute teachers' interest-arbitration proceedings.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER 2/

The instant complaint filed herein be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 2/ appears on the next page.)

2/ 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

The MTEA argues that the District violated Sec. 111.07(3)(a)4, Stats. by failing to meet with Arbitrator Tyson within a reasonable time because the "duty to bargain collectively has long been held to encompass the responsibility of the employer to be available at reasonable times to negotiate with the union." 4/ It argues that an employer's subjective good faith is not a defense where, as here, the objective facts establish that the District has failed to comply with its legal responsibilities because of its "failure to allocate sufficient resources to enable the employer to proceed to interest-arbitration. . ." The MTEA also asserts that the October dates offered by the District were unreasonable because they did not give the parties adequate time to prepare in the aftermath of the October 20 hearing regarding the teacher's aides and that the November dates were unreasonable because they coincided with the Association's annual convention --- a fact well-known to the District. As a remedy, the MTEA seeks a cease and desist order directing the District "to make available sufficient personnel to meet its bargaining obligations under the Act and to proceed with reasonable promptness to interest arbitration hearings pursuant to Sec. 111.70(4)(cm)6, Stats."

The District, on the other hand, maintains that the MTEA's complaint fails to state a cause of action because the District, in fact, bargained in good faith and because the District offered to meet in October and November - only to be spurned by the MTEA. It thus asserts that it was not "solely responsible" for the delay in scheduling the interest arbitration proceedings and that the complaint therefore should be dismissed.

DISCUSSION

4/ The MTEA cites several cases in support of its position: Insulating Fabricators, 54 LRRM 1246 (1963); Potters Medical Center, Inc., 289 NLRB 201 (1988); and Storer Communications, Inc., 133 LRRM 1118 (1989).

This proceeding never should have occurred. The parties here knew in the beginning of 1992 that the disputes involving the accountants/bookkeepers and substitute teachers were headed for interest-arbitration and that, as a result, it was necessary for them to block out sufficient dates on their calendars for that purpose. Had that been done before arbitrator Tyson was selected in April and May, it would have been relatively simple to then have asked him whether he was available for those dates. Alternatively, the parties could have set up a telephone conference call with arbitrator Tyson as soon as he was selected for the purpose of choosing hearing dates.

But none of that was done, perhaps because of the ongoing settlement discussions which occurred in April - July. The net result was a six-month delay before there was any direct discussion among the parties and arbitrator Tyson regarding specific hearing dates.

The matter was then even further delayed because of the parties' desire to complete the then-pending lengthy interest-arbitration proceeding involving the teacher's aides. Thus, the parties participated in the latter proceeding on September 10 and October 1, 2, 12, 16 and 20, thereby using up the October 20 date which Ford had earlier suggested be set aside for the accountants/bookkeepers and substitute teachers' interest-arbitration proceedings. The parties also mutually agreed not to schedule the latter proceedings on October 21, 22 or 23 - which were three other dates Ford had suggested in her August 28 letter and which were accepted by Arbitrator Tyson.

As of October, then, it must be concluded that the District cannot be held solely responsible for the fact that the accountants/bookkeepers and substitute teachers interest-arbitration hearings were not yet held.

As for November, Ford's August 28 letter also suggested November 2-6 as possible dates. The November 4-6 dates, however, were unacceptable to the MTEA because its annual teacher's convention was held on those dates in Milwaukee, Wisconsin. Be that as it may, the fact remains that the District did offer November dates and that it was the MTEA itself which decided it did not want to schedule any hearings on November 4 and 5 even though Arbitrator Tyson was available on those dates. Furthermore, the District offered November 2 but that date, too,

was rejected even though Arbitrator Tyson also was available on that date. In addition, Kuhnmuench testified here without contradiction that she and Attorney Quindel had mutually agreed not to schedule any hearings during the last week of November because of the Thanksgiving holiday. As a result, the MTEA itself was only available for two weeks in November. Furthermore, there is no evidence in this record as to whether Arbitrator Tyson was available during those two weeks.

These facts therefore establish that the District also cannot be held solely responsible for the fact that no hearings were held in November.

As for December, Ford on September 18 offered December 16 as a hearing date. But that was obviously insufficient given the fact that more than one hearing date was needed to hear both proceedings

and the strong possibility that each hearing would last more than one day.

Here, though, it must be remembered that the District had offered sufficient dates for October and November and that December was marked by the holiday season which normally presents scheduling difficulties. Thus, Kuhnmuench testified that both she and Quindel were unavailable for some of this time. In addition, the District offered January 20, 21, 22, 25, 26 and 29 and the first two weeks of February, 1993, as hearing dates, thereby showing that it was making a good faith effort to schedule these matters as soon as possible. Indeed, Kuhnmuench herself suggested additional dates to Attorney Quindel and Arbitrator Tyson so that the proceedings would be concluded without any further delay.

In light of all of these mitigating factors, I therefore conclude that the District's conduct in scheduling the two interest-arbitration cases did not constitute an unlawful refusal to bargain. 5/ The complaint is therefore dismissed.

Dated at Madison, Wisconsin this 15th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

5/ This finding, of course, is limited to the unique facts of this case. Hence, nothing herein should be misconstrued to mean that parties are free to dawdle in scheduling such matters. To the contrary, parties have an affirmative obligation to make themselves available at reasonable times to fulfill their collective bargaining obligations, irrespective of how busy they otherwise may be. See for example footnote 3, supra. See also, Plumbers and Pipefitters Local 557 v. Jerome Fillbrandt Plumbing and Heating, Inc., Dec. No. 27045-C (WERC, 9/92).