STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PESHTIGO EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, Complainant, vs. PESHTIGO SCHOOL DISTRICT, Respondent.	Case 23 No. 49273 MP-2738 Decision No. 27730-A

Appearances:

Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Peshtigo Educational Support Personnel Association.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, 333 Main Street, Suite 600, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the Peshtigo School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 20, 1993, Peshtigo Educational Support Personnel Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Peshtigo School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)7 of the Municipal Employment Relations Act. On July 19, 1993, the Commission 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. Hearing on the complaint was held in Green Bay, Wisconsin, on September 23, 1993. The parties filed briefs and reply briefs, the last of which were exchanged on December 15, 1993. The Examiner, having considered the evidence and arguments of Counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Peshtigo Educational Support Personnel Association, hereinafter referred to as the Association, is a labor organization and its offices are located c/o Charles Garnier, WEAC Coordinator, WEAC Regional Office, 550 East Shady Lane, Neenah, Wisconsin 54956.

2. Peshtigo 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 341 North Emery Avenue, Peshtigo, Wisconsin 54157.

3. The Association has, at all times material herein, been the exclusive bargaining representative of employes of the District in a bargaining unit set forth as follows:

> All regular full-time and regular part-time aides, custodians, food service and secretarial employes.

4. On or about November 26, 1990 the parties began negotiations over the first collective bargaining agreement to cover the employes in the unit set forth in Finding of Fact 3. On June 27, 1991, the Association filed a petition for interest arbitration under Sec. 111.70(4)(cm)6, Stats. On or about January 31, 1992, the parties exchanged their last final offers.

5. The District's final offer contained the following salary schedule for the 1990-91 school year:

	Probation	Up to 1	Over 1
Aides	5.97	6.71	7.46
Secretary	6.41	7.21	8.01
Food Service Personnel	5.88	6.62	7.35
Custodians	6.77	7.61	8.46

The District's final offer also contained the name of each employe as well as the rate of pay for the 1990-91 school year as follows:

Andrews		7.38
S. Olson		7.38
Pesmark		7.38
Hanson	6.94	
Krautkram		6.94
Seymour		6.94
Strouf	6.94	
Schonfeld		7.04
Baker		7.04
England		7.04
Behling		7.04
Cota		6.53
Drewery		6.41
Duescher		6.41

C. Watson		6.41
Zinther		6.53
Schultz		5.70
Strojny		8.09
Leigh		8.05
Staudenma		8.09
R. Watson		8.05
L. Olson		8.01
Myers		7.92
Rich		7.92
Garrett		7.92
Coble		7.92
Boesen	7.92	
Lund		7.92
Emmes		7.92
Presti	7.03	
Jones		7.03

The final offer also contained associated costing data for the wage rates. Certain employes' 1990-91 pay rate was higher than the maximum of the schedule set out above and for each of these employes the final offer set forth a non-cumulative lump sum payment for the 1990-91 school year, and this sum was also costed into the final offer. All other employes' pay rates set out in the final offer differed from the schedule set out above but reflected an increase in pay rate ranging from 6 percent to 26 percent, which also was costed in the final offer.

6. During mediation prior to interest arbitration, the District's Business Manager explained the District's proposal to the Association's caucus and explained the lump sums for those above the schedule as well as explained that other employes would be paid below the schedule.

7. The parties did not reach a voluntary settlement and went to interest arbitration. With respect to the District's final offer on wages, the Association made the following arguments to the interest arbitrator:

> 5. Regarding the same topic of wage-rate phase-in when applied to the District's wage proposal, the Association avers that the District wage rate proposals for aides and custodians for 1990-91 are irrelevant because no employees will actually receive such rates. . . . The same discrepancy holds true when the District's 1990-91 proposal for custodians is considered. The District lists $8.46/hr. as its offer but an examination of

> Employer Ex. 5b establishes that the range of rates actually received by custodians will be $7.92/hr. to $7.03/hr.
>
> . . .
>
> With regard to the custodians, the correct maximum wage rates as listed on Association Exhibit #25x and Employer Exhibit 20 for the District's proposals should be $7.92 and not $8.46.

6. The Association avers that its previously mentioned phase-in procedure should not be cast in the same light as the District's because the Association's proposal places a significant number of employees at the maximum rate listed on Appendix A of its proposal. On the other hand the District's phase-in procedure is not given sanction by its own proposal and negatively affects all employees in the above-mentioned categories. The Association further avers that when the above corrections are made regarding aides and custodians for 1990-91, the gap between the proposals of the parties is significantly reduced.

8. On February 8, 1993, the interest arbitrator issued an award selecting the District's final offer. The arbitrator, in part, stated the following with respect to the District's offer regarding custodians:

> There is some question as to the District's figure of $8.46 for 1990-91. The Association points to a discrepancy between the amount of $7.92 shown in Employer Ex. 5b as the custodial hourly rate for all but two of the employees (Presti and Jones at $7.03). The arbitrator notes also that $7.92 is the hourly rate for custodial staff provided in Employer Ex. 2n. Although the District has utilized the $8.46 figure in its exhibit 20, which compares its offer with the comparables, and throughout its briefs, the arbitrator can find no explanation for the two divergent figures.

The arbitrator went on to say:

> . . . an appropriate comparison is between the parties' final offers on custodians with the wage rates for custodian's (sic) in the five comparable school

districts, Coleman, Crivitz, Gillett, Marinette, and Wausaukee. As indicated earlier, there is a discrepancy in the District's 1990-91 maximum hourly rate. The lower figure, $7.92, will be used in the table which follows:

	1990-91	1991-92	1992-93
Conference Average (Custodian)	$ 8.94	$ 9.27	$ 8.54
Association Offer	7.87	8.50	9.00
District Offer	7.92	8.73	9.12

Inspection of the data reveals that the District's offer more closely approximates the average of the comparables.

The parties submitted lengthy and informative briefs on the issue of compensation which have not been specifically addressed, e.g., costing questions, wages for aides, secretaries, remuneration for employees hired after 1988, etc. It is the arbitrator's opinion, and it is so held, that these matters will be resolved by the adoption of the District's final offer on wages which is deemed to be the more reasonable.

8. After the arbitrator issued her award, the District paid employes in accordance with the amounts listed on its final offer, which was $7.92 per hour for custodians. The District paid retroactive pay in accordance with its final offer as awarded by the interest arbitrator.

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

CONCLUSION OF LAW

The District properly implemented the arbitrator's decision of February 8, 1993, which was lawfully made under Sec. 111.70(4)(cm), Stats., and therefore, did not commit a prohibited practice in violation of Sec. 111.70(3)(a)7, 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/

The Peshtigo Educational Support Staff Personnel Association's complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 6th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
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.

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

PESHTIGO SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the District had violated Sec. 111.70(3)(a)7, Stats., by failing and refusing to implement the arbitrator's award lawfully made under Sec. 111.70(4)(cm), Stats. The Association alleged that the District did not grant retroactive pay to certain employes who were hired prior to August 1, 1988, and had more than one year's experience with the District in accordance with the salary schedule for the 1990-91 school year. The District answered the complaint denying that it failed or refused to implement the arbitrator's award and denied committing any prohibited practice. The Association filed a Motion for Summary Judgment based on the pleadings, but after the hearing in this matter, it withdrew its Motion.

Association's Position

The Association contends that the District was required to pay employes the amounts set forth in the salary schedule contained in its final offer. It asserts that as the District's offer was selected, the employes' wages must be gleaned from that offer and what the District said its offer meant. It notes that the District's offer contained a salary schedule and the stipulated language was that following probation, employes "will receive the hourly rates indicated," and the wage proposal was fully retroactive. The Association points out that its final offer expressly provided that there would be a phase in and the District's offer contained no such language. The Association argues that the District's brief to the arbitrator specifically argued that it was offering the rates in the proposed salary schedule and did not argue that it would pay employes according to how it costed the schedules but rather according to the schedules themselves. The Association, referring to its brief, pointed out the disparity that the District's offer was less than the scheduled amounts and the District, in reply, asserted the scheduled amounts applied and not the costing. The Association asserts that once the District won in arbitration, it had a totally different position as to its salary proposal for 1990-91 and it was the costing figures and not the salary schedule. It claims that the District should not be allowed to propose a salary schedule, argue it to the arbitrator and then argue it does not apply, but rather the costing figures apply.

The Association maintains that the specific language agreed to by the parties requires the employes be paid according to the schedule and they be paid fully retroactive. It insists that merely because the District's costing does not match its proposal does not elevate the costing above the salary proposal. It asserts that such a conclusion is troubling. It admits that where there is an obvious typographical error, it might be appropriate to reform the contract, but this is not the case here. The Association posits that the salary schedule was not an error as it was calculated from the comparables, the District argued the amounts to the arbitrator, it included only the schedule in the contract and not the costing data, and it would be inappropriate to allow the District to ignore the salary schedule and use the costing information to dictate the employes' wages.

The Association concludes that the District failed to properly implement the arbitrator's award when it failed to pay employes the amounts contained in the salary schedule for the 1990-91 school year and it asks that the District

be ordered to fully remedy its violation.

District's Position

The District contends that it paid employes pursuant to its final offer. It maintains that the costing was clearly part of its wage offer submitted as its final offer. It asserts that the costing was not merely a supportive document, but the rate proposed as well as the lump sum payments were included along with the costing. The District claims that the wage schedule would not be an appropriate wage offer because this was an initial contract and employes would be placed on the schedule on a different basis. It also alleges that the lump sum amounts cannot be accounted for because if the schedule is the wage offer, then everyone should be paid according to it. The District argues that the total dollar amount and percentage listed clearly establishes that its proposal was not the wage schedule but the individual rates. The District also points out that these rates were discussed with the Association and explained to them in mediation and at the arbitration hearing. It submits that the Association understood the District's proposal based on the Association's arguments in its brief to the arbitrator.

The District claims that a review of the arbitrator's award establishes that she selected the District's offer based on the wage costing and held that issues over costing would be resolved by adoption of the District's final offer. The District notes that the arbitrator used the figures in the District's costing in the analysis of the comparables.

The District submits that the Association should be estopped from disputing the District's method of calculating back pay because during the interest arbitration it took the exact position it now seeks to disavow. The District insists that the Association should not be permitted to maintain inconsistent positions in separate actions involving the same parties and actions. It refers to the Association's brief wherein it argued that the District's "phase in" and actual wage rate proposals should be considered so as not to sanction the District's over-evaluation of its final offer.

The District maintains that it is inconceivable that the Association did not understand that the costing was part of its proposal as the Association spokesmen's testimony was not credible or logical, was contradictory and did not conform to their conduct. It points out that the Association costed out the District's proposal just as the District did, so as not to have the District's proposal higher than the Association's proposal in the first year, which might be construed as a negative in interest arbitration. It submits that the Association submitted the costing as an exhibit and argued to the arbitrator

that the costing was the District's actual wage proposal. It insists that the Association cannot credibly argue that it did not understand the District's offer.

The District asserts that the Association has acted in bad faith because they knew there was an alleged discrepancy which they attempted to exploit in interest arbitration and again in the instant proceedings. The District argues that the law requires the parties to bargain in good faith and arbitration ought not to be trial by trickery. It submits that the Association's conduct in arbitration amounts to incompetence or outright misrepresentation, and the Association should not profit from its misconduct, and it asks that the complaint be dismissed and it be awarded reasonable attorneys' fees and costs.

Association's Reply

The Association contends that because its proposal had a phase in whereas the District's proposal did not, that if the District had intended a phase in, it would have included such language, thus the District's intent is illustrated by the lack of "phase in" language. The Association maintains that the District's arguments to the interest arbitrator belie its argument in this case. The Association notes that the District has accused the Association of taking inconsistent positions, but it is the District which has made inconsistent arguments. It refers to the arbitrator's decision which states that the District's figure of $8.46 was utilized by the District, but the arbitrator noted that $7.92 was provided in the District's Exhibit 2n. Yet, she could find no explanation for the two divergent figures. The Association submits that if the District's proposal was explained at the hearing, the arbitrator would never have made such a statement and so it must be concluded that the District did not explain its proposal.

The Association admits that the arbitrator used the costing amounts, but only did this because it made no difference in the outcome and the arbitrator never did define the District's wage offer, so the Arbitrator's decision is not probative. The Association takes the position that the lump sum payments must be treated differently than the "phase in" because the lump sum payments were not contrary to the wage schedule and were expressly discussed by the parties. The Association also notes that the lump sum was less than the "phase in" and there was no proof that the "phase in" was used to make up for the lump sums. The Association contends that its arguments to the interest arbitrator were appropriate because the District's salary proposal was contradictory. The Association asserts that the District's arguments should be binding on the District. It asks which is more compelling, one side's argument about the other's proposal or the statements of the party about its own proposal? It maintains that the District should be held to what it said about its own proposal.

The Association claims that it was not obligated to clarify the District's proposal and it could argue the inconsistencies as a reason not to adopt the District's proposal. It maintains that the District was obligated to clarify its own proposal and it claims it did so in its reply brief by arguing that it was proposing the salary schedule. It submits that the District should not be allowed to duck its previous assertions. The Association claims that the District should be estopped from now arguing that it did not intend the amounts of the salary schedule to be fully retroactive.

District's Reply

The District insists that the Association knew the District's offer was

based on the costing contained in its final offer because they were aware of the "lump sum" payments, the District explained its offer during mediation, and the Association in its interest arbitration brief accurately conveyed the essence of the District's offer.

The District states that the Association knew the salary schedule was irrelevant with respect to 1990-91 because the Association said so in its arbitration brief, the lump sum amounts were understood by them and the total dollar amount and total percentage were listed which clearly evidenced its proposal. The District asserts that it did not place the costing in the contract because it only applied to back pay for 1990-91 and also the lump sums were not included in the contract, and there was no reason to include all the costing in the contract for the first year.

Contrary to the Association's arguments, the District maintains that the stipulated language in Articles XXVII and XXX was not intended to apply to the retroactivity of the arbitrator's award.

The District insists that it offered the salary schedule for comparisons purposes only and not for calculating back pay in the first year of the contract. It notes that the arbitrator selected the District's offer based on the costing and not the wage schedule. The District points out that at the time of the hearing the parties' were in the second year of the contract and the rates for the first year were for back pay only. The salary schedule was for comparison only and that is why the costing was part of the District's actual wage proposal and the Association knew it.

The District ascribes devious conduct and motives to the Association mischaracterizing the District's offer to gain an advantage. It claims that this conduct does not comport with the duty to bargain in good faith. It points out that the Association's negotiator inquired whether the costing should be included in the contract, and if the costing were merely for costing, why would he do this except for his knowing the nature of the District's offer. The District submits that the evidence establishes that the costing was part of the District's final offer and the Association knew it, and it asks that the complaint be dismissed and because of the unconscionable conduct of the Association," it seeks attorneys' fees and costs.

DISCUSSION

The issue in this case is whether the District's final offer for 1990-91 was the wage schedule or the individual wage rates also set out in the District's final offer.

A review of the District's final offer on wages establishes that the District was not offering just a wage schedule. Rather, it is clear that it was offering the wage rates set out after each employe's name. 2/ The document must be read as a whole, and although it contains a wage schedule, it also contains the specific rates after each employe's name as well as lump sum payments. The costing data which was also included in the final offer on wages for 1990-91 makes it clear that the wage rates and lump sums are what was offered as that was what was costed and the costing data confirms that the wage schedule was not even costed. Contrary to the Association's argument, the District is not elevating costing data above its wage proposal because the wage rates were its proposal and the costing data simply costs out these wage rates.

Additionally, it is admitted that the lump sums were explained by the

2/ Ex. 10.

District in mediation. 3/ I have credited Julie Schroeder's testimony that she also explained the wage rates in the District's final offer. 4/

It is further noted that the Association's brief to the interest arbitrator accurately described the District's final offer in terms of the wage rates listed as opposed to the salary schedule. 5/ The record indicates that in mediation, employes recognized that there was a difference in rates from the schedule and the Association's spokesman explained that they were not to worry because if that was a costing error, it was the District's problem. 6/ However, this was ignoring the reality of the situation. The District was proposing wage rates as part of its final offer and not the wage schedule. Passing this off as a costing error simply ignores that the wage rates were accurately costed and there was no error except to assume the wage schedule applied.

The interest arbitrator understood this and used the wage rates proposed and not the schedule. 7/ The interest arbitrator stated as follows:

> "The Association points to a discrepancy between the amount of $7.92 shown in Employer Ex. 5b as the custodial hourly rate for all but two of the employees

---

3/ Tr. 95, 97.

4/ Tr. 84, 89, 90, 108.

5/ Ex. 4.

6/ Tr. 101.

7/ Ex. 2.

(Presti and Jones at $7.03). The arbitrator notes also that $7.92 is the hourly rate for custodial staff provided in Employer Ex. 2n." 8/

"Although the District has utilized the $8.46 figure in its exhibit 20, which compares its offer with the comparables, and throughout its briefs, the arbitrator can find no explanation for the two divergent figures. . . . As indicated earlier, there is a discrepancy in the District's 1990-91 maximum hourly rate. The lower figure, $7.92, will be used in the table which follows.

. . .

The parties submitted lengthy and informative briefs on the issue of compensation which have not been specifically addressed, e.g., costing questions, wages for aides, secretaries, remuneration for employees hired after 1988, etc. It is the arbitrator's opinion, and it is so held, that these matters will be resolved by the adoption of the District's final offer on wages which is deemed to be the more reasonable." 9/

I think that it is clear that the arbitrator was saying that the $7.92 figure appears in the District's final offer and the Association asserted that $7.92 was the correct number. The arbitrator noted that the District came up with $8.46 but could find no explanation why, so she used the $7.92 figure. The arbitrator selected the District's final offer based upon the $7.92 figure, so her decision establishes that she was selecting the final offer with the wage rates ($7.92) and not the wage schedule included in the final offer.

It appears that the Association is attempting to obtain in this proceeding that which it failed to obtain in the interest arbitration. The arbitrator indicated that not all issues of compensation were specifically addressed by her but would be resolved by adoption of the District's offer. The District's offer was the listed wage rates and not the wage schedule, and it is therefore concluded that the District has complied with the award and has not violated Sec. 111.07(3)(a)7, Stats.

The District has requested that it be awarded attorneys' fees and costs as the Association's conduct in this matter was unconscionable. The Commission

---

8/ Employer Ex. 2n was the District's final offer and is Ex. 10 in this proceeding.

9/ Ex. 2.

has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 10/

The District's brief to the interest arbitrator used the wage schedule for comparison purposes with other comparable school districts and the District did not make it clear to her that it was the wage rates in the first year that were being proposed. 11/ This caused the interest arbitrator some confusion and made the instant complaint arguable rather than frivolous. Therefore, the request for attorneys' fees and costs is denied.

Dated at Madison, Wisconsin, this 6th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

10/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).

11/ Ex. 3.