STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AUGUSTA SCHOOL DISTRICT, Complainant, vs. WEST CENTRAL EDUCATION ASSOCIATION - AUGUSTA AUXILIARY UNIT, Respondent.	Case 38 No. 49940 MP-2804 Decision No. 27857-A

Appearances:
Mr. Michael D. McCarthy, Membership Consultant, Wisconsin Association of School
Mr. Anthony L. Sheehan, Staff Counsel and Ms. Chris Galinat, Associate Counse
Augusta Auxiliary Unit.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER GRANTING MOTION
TO DISMISS COMPLAINT

On October 19, 1993, the Augusta School District filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission wherein it alleged that the West Central Education Association - Augusta Auxiliary Unit had committed a prohibited practice within the meaning of Sec. 111.70(3)(b)3, Stats., by prematurely filing a petition for interest-arbitration and thereby evidencing a failure to bargain in good faith. On November 12, 1993, the West Central Education Association - Augusta Auxiliary Unit filed its Answer wherein it denied certain factual allegations contained in the complaint, as well as the allegation it had bargained in bad faith, and moved to dismiss the complaint. Said Answer also asserted that the complaint was moot since a mediator had been assigned to investigate whether the parties were at impasse in their negotiations. The Commission appointed David E. Shaw, a member of its staff, to act as Examiner and make Findings of Fact, Conclusion of Law and Order in the matter. Hearing was set for November 23, 1993, but was postponed by agreement of the parties in order to attempt to resolve their dispute. On December 15, 1993, the West Central Education Association - Augusta Auxiliary Unit renewed its motion to dismiss the complaint on the basis that it is moot since an investigator from the Commission was conducting an investigation to determine whether an impasse exists and whether the petition for interest-arbitration was filed prematurely. Citing, Milwaukee Public Schools, Dec. No. 23689 (WERC,

5/86). Thereafter the Augusta School District was given the opportunity to respond to the motion to dismiss, and by letter of January 7, 1994, requested that the complaint not be dismissed. The Examiner has reviewed and considered the pleadings of the parties, their arguments in support of their respective positions and the applicable law, and being satisfied that the instant motion to dismiss should be granted, now makes and issues the following Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. The Augusta School District, hereinafter the Complainant, filed a complaint of prohibited practices on October 19, 1993, with the Commission wherein it alleged, in relevant part:

> Pursuant to Wisconsin Statute (111.70)(3), the Augusta School District is filing a prohibited practice complaint. This complaint is in response to the premature filing of a petition for arbitration by the West Central Education Association-Augusta Auxiliary Unit. The District supports its position on the basis of the following:
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> 1. On Monday, May 24, 1993, the parties met to exchange initial proposals. It was agreed by both parties that the next negotiations meeting would be scheduled after the state budget was passed. At the time, neither party knew what the possible consequences of this state budget would be on the this (sic) particular negotiations process. The parties jointly agreed to delay negotiations until the state budget passed. Consequently, the Board of Education did not submit an economic offer to the WCEA-Auxiliary Unit. The union understood the rationale supporting this decision.
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> 2. On Thursday, September 23, 1993, the parties met again to negotiate a successor agreement. The District provided the WCEA-Augusta Auxiliary Unit with an economic offer on this date. Please note that no economic offer had been submitted to the Augusta Auxiliary Unit prior to this date. The two parties negotiated for approximately 2.5 hours and nearly reached an agreement. At the end of the bargaining session, the union representative provided the Board of Education with an already mailed petition for Arbitration pursuant to Section 111.70(4)(cm)6, Wisconsin Statutes. The petition was sent the day of negotiations before the parties met at the bargaining table.
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> 3. On Monday, October 11, 1993, the District contacted the assigned mediator through its representative to discuss the mediation/arbitration hearing date. During that phone conversation, it was explained to the mediator that the two parties should not be considered at impasse since they had only met two previous times. In addition, the second meeting was the first time that the Auxiliary Unit had received the District's economic offer

plus discussion was continuing on the important issue of health insurance carrier changes. The assigned mediator explained to the District's representative that it was not the role of the mediator to postpone the mediation/arbitration session until further notice instead of filing a prohibited practice complaint in light of the situation.

The Augusta School District is strongly opposed to the petition for arbitration and views it as an act contrary to bargaining in good faith. The District's Auxiliary Unit employees had not even received an economic offer until the second meeting. What is interesting is that the Unit's representative is stating that there is an impasse in the negotiations process when the District has not even submitted its complete offer. It is also important to note that changes in the Unit's health insurance carrier are also being discussed. These type of changes are important to communicate and discuss before they can be agreed upon. The District believes that the Unit's representative is rushing a decision on the individuals represented.

The District concludes that it is much too early for a third-party to enter into the negotiations process at this time. The parties need to meet several more times to discuss the proposals and bargain in good faith.

2. The West Central Education Association - Augusta Auxiliary Unit, hereinafter the Respondent, filed a motion to dismiss the instant complaint on December 15, 1993.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The facts alleged in the instant complaint filed by Complainant Augusta School District do not provide a basis for granting relief under Section 111.70(3)(b) of the Municipal Employment Relations Act.

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

ORDER 1/

1. The Motion to Dismiss filed by Respondent West Central Education Association - Augusta Auxiliary Unit is hereby granted.

2. The complaint filed in the instant matter by Complainant Augusta School District is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 4th day of February, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/

David E. Shaw, 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,

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

> 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).

AUGUSTA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER
GRANTING MOTION TO DISMISS

The gist of the instant complaint is that Respondent's representative prematurely filed a petition with the Commission for interest-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., in that it was filed just prior to the parties' meeting for only the second time and before the Complainant had even made an economic offer to Respondent. The Complainant asserts that such a premature filing for interest-arbitration is "contrary to bargaining in good faith" and that the parties need to meet several more times to discuss the proposals and bargain in good faith before a third party should enter into the negotiations process. Complainant requests that its complaint not be dismissed.

In support of its motion to dismiss the complaint, the Respondent asserts that since an investigator from the Commission's staff has been assigned to investigate and determine whether the parties are at impasse, the complaint is moot. It further asserts that the investigator has met with the parties in an attempt to mediate the contract dispute and that the investigation process is the appropriate procedure for determining whether the parties are in fact at impasse and whether the petition was prematurely filed. Citing, Milwaukee Public Schools, Dec. No. 23689 (WERC, 5/86). Respondent concludes that as the parties are in the investigative process, the complaint should be dismissed.

DISCUSSION

The following has been stated as the standard to be applied in deciding a pre-hearing motion to dismiss a complaint:

> Because of the drastic consequences of denying an evidentiary hearing, a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 2/

As noted above, the gist of the complaint is that Respondent failed to bargain in good faith by prematurely filing a petition for interest-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., before the parties met for a second time and before the District made an economic offer to the Association. Section 111.70(4)(cm)6, Stats., provides, in pertinent part:

> 6. Interest arbitration. If a dispute has not been settled after a reasonable period of negotiation and after mediation by the commission under subd. 3 and other settlement procedures, if any, established by the parties have been exhausted, and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party, or the parties jointly, may petition the commission in writing, to initiate compulsory, final and binding arbitration, as provided in this paragraph.
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> a. Upon receipt of a petition to initiate

2/ Unified School District No. 1 of Racine County, Dec. No. 15915-B (Hoornstra, with final authority for WERC, 12/77) at p. 3.

> arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether arbitration should be commenced. If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering arbitration. . .

In the 1986 decision cited by the Respondent, Milwaukee Public Schools, supra., the Commission had occasion to consider the effect of the predecessor of Sec. 111.70(4)(cm)6, Stats., - the "mediation-arbitration" statute of the same enumeration. 3/ While the Commission's decision does not deal with an alleged prohibited practice by the party filing a premature petition, it does address the approach for dealing with instances where one of the parties asserts that the interest-arbitration petition is premature. For that reason the Examiner finds the Commission's discussion in Milwaukee Public Schools relevant in this case. In denying the objecting party's motion to dismiss the petition, the Commission stated as follows:

> The basis of the Association's motion is that the requirements set forth in subsection 6 have not been met and the petition must be dismissed. Our reading of subsection 6.a. indicates that the Commission shall make an investigation to determine whether the procedures set forth in subsection 6 have been complied with, and if they have not been complied with, then it may order such compliance prior to ordering mediation-arbitration. Thus, it seems clear that one of the purposes of the investigation is to determine whether the requirements of a reasonable period of negotiation, as well as mediation, and other settlement procedures, established by the parties, have been exhausted. Therefore, we conclude that these requirements are not prerequisites for the initiation of an investigation, but rather, as argued by the

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3/ Prior to the change in the law in 1986, Sec. 111.70(4)(cm)6, provided, in relevant part, as follows:

> 6. Mediation-arbitration. If a dispute has not been settled after a reasonable period of negotiation and after mediation by the commission under subd. 3 and other settlement procedures, if any, established by the parties have been exhausted, and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party, or the parties jointly, may petition the commission, in writing, to initiate mediation-arbitration, as provided in this section.
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> a. Upon receipt of a petition to initiate mediation-arbitration, the commission shall make an investigation, with or without a formal hearing, to determine whether mediation-arbitration should be commenced. If in determining whether an impasse exists the commission finds that the procedures set forth in this paragraph have not been complied with and such compliance would tend to result in a settlement, it may order such compliance before ordering mediation-arbitration.

As they relate to this case, the present statute and its predecessor are identical.

District, are prerequisites to any order for mediation-arbitration.

In practice, upon receipt of a petition for mediation-arbitration, the Commission assigns an investigator who weighs the various factors in a given case, including the extent of prior negotiations, in determining how best to process the petition toward the objectives of voluntary settlement, avoidance of undue delay, and effective use of agency resources. Unless the matter has been previously mediated or the parties have formally agreed to waive Commission mediation, the investigator will ordinarily endeavor to mediate the dispute as a part of the investigation, giving consideration to the extent of prior negotiations and other factors in making judgments about when to meet with the parties, when to call for final offer exchanges, and when to draw the investigation to a close. The Commission relies heavily on the investigator's professional assessment of each situation based upon the investigator's discussions and meetings with the parties. Where the Commission or the investigator have reason to believe that a mediation effort is or would be premature, it may be suggested to the parties that they engage in further unmediated negotiations; and, in extreme situations, the investigator may recommend that the Commission formally order further unmediated negotiations as a condition precedent to an order initiating mediation-arbitration in the matter.

For the foregoing reasons, we conclude that the assignment of an investigator to weigh the various factors and determine the most appropriate course of action in a given investigation is both a more practical approach and one more conducive to reaching a prompt resolution of the parties' negotiations than is a procedure entitling the parties to a formal hearing and determination as to whether a reasonable period of negotiations has preceded petition filing.

Our conclusion in that regard appears more likely to prompt the resolution of disputes subject to mediation-arbitration. A contrary conclusion would permit a non-cooperative party to delay the investigative process by insisting on a hearing on a motion to dismiss for failure to negotiate for a reasonable period of time and then later insisting on a hearing on a motion to dismiss because of no mediation under subd. 3, and then still later challenging whether impasse exists. We wish to make it clear that we are not questioning the Association's sincerity in bringing its motion in this case, but we note the amount of delay experienced in this matter from the filing of the petition for mediation-arbitration to this date as illustrative of the potential for deliberate delay.

We have not considered the factual underpinnings of the Association's argument because we are of the opinion that, as a matter of policy as stated above, the appropriate method for resolving the instant dispute between the parties is through an

> investigation. In short, the appropriate forum for the Association's raising its claim of a lack of a reasonable period of negotiations is in the investigation rather than through a motion to dismiss the petition. 4/

The Commission's reasoning would also seem to apply in a case, such as here, where the basis of an alleged prohibited practice is the premature filing of the interest-arbitration petition. The relief contemplated by the statute is not to find a prohibited practice for refusing to bargain within the meaning of Secs. 111.70(3)(a)4 or (3)(b)3, Stats., rather, it is to have the investigator from the Commission's staff determine in the course of the investigation whether an impasse exists and whether it is premature to order interest-arbitration. In doing so, the Commission/investigator may suggest that the parties engage in further unmediated negotiations.

Although there may be instances where the premature filing of an interest-arbitration petition may, as part of the totality of the circumstances, be indicative of a refusal to bargain, standing alone it does not present a basis for finding a violation in that regard. Therefore, the Examiner has concluded that, assuming the facts alleged in the instant complaint to be true, the motion to dismiss the complaint should be granted.

Dated at Madison, Wisconsin this 4th day of February, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

4/ Dec. No. 23689, at pp. 4-5.