STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.	Case 132 No. 50540 MP-2858 Decision No. 27982-A

Appearances:

Mr. Anthony L. Sheehan, Staff Counsel and Ms. Chris Galinat, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, 53708-8003, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondents.

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

Racine Education Association filed a complaint on February 11, 1994, with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District and the Board of Education of the Racine Unified School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act, herein MERA. On March 3, 1994, Respondents, by Counsel, filed a Motion to Dismiss the Complaint with supporting arguments. On March 7, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions and Order as provided in Sec. 111.07(5), Stats. On March 11, 1994, Complainant, by Counsel, filed a response to the Motion to Dismiss along with supporting arguments. On March 17, 1994, the Respondent, by Counsel, submitted a reply to the Complainant's arguments. The Examiner having considered the pleadings and the Motion and the arguments of Counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Racine Education Association, hereinafter referred to as the Association, is a labor organization and is the exclusive collective bargaining representative of a unit consisting of all regular full-time and regular part-time certificated teaching personnel employed by the District and including employes in the classifications of Wellness Coordinator, Research Associates, Physical Therapists, Occupational Therapists, Diagnosticians, Program Support Teachers, and At-Risk Coordinators, but excluding on call substitute teachers, interns, supervisors, administrators and directors. The above-described unit consists of both school district professional employes and employes who are not school district professional employes as defined under Sec. 111.70(1)(ne), Stats. The Association's offices are located: c/o James Ennis, 516 Wisconsin Avenue, Racine, Wisconsin 53403.

2. Racine Unified School District and the Board of Education of the Racine Unified School District, hereinafter referred to as the District, is a municipal employer and its offices are located at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

3. The Association and the District have been parties to a series of collective bargaining agreements for approximately 20 years and the latest agreement expired on August 24, 1992. The parties exchanged initial offers for a successor contract in July, 1992 and met in bargaining on at least nine occasions. In January, 1993, the District filed a petition for interest arbitration.

4. On August 12, 1993, 1993 Wisconsin Act 16 became effective and made substantial changes to MERA.

5. On or about January 14, 1994, the District filed a unit clarification petition with the Commission seeking to have employes who are not school district professional employes excluded from the bargaining unit described above in Finding of Fact 1 and put in a separate unit.

6. On February 11, 1994, the Association filed the instant complaint alleging that the District committed prohibited practices by filing the unit clarification petition at this time because by doing so the District engaged in bad faith bargaining.

7. On March 3, 1994, the District, by Counsel, moved to dismiss the complaint because it failed to allege a prohibited practice within the meaning of MERA.

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

CONCLUSION OF LAW

The facts alleged in the instant complaint filed by the Racine Education Association fail to state any prohibited practice within the meaning of Secs. 111.70(3)(a)4 or 1, Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

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

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

Dated at Madison, Wisconsin this 29th day of March, 1994.

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

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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).
the procedures set forth in Sec. 111.07(5), Stats.

Racine Unified School District

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

In its complaint initiating these proceedings, the Association alleged that the District violated Secs. 111.70(3)(a)4 and 1, Stats. by bargaining in bad faith by the timing of its filing a petition for unit clarification with the Commission. The District moved to dismiss the complaint on the grounds that the complaint failed to allege a prohibited practice within the meaning of MERA.

District's Arguments

The District contends that there are no factual issues in dispute in this case and that only legal issues are present, so no hearing is required to decide the matter. The District argues that it is not a prohibited practice to file a unit clarification petition. It submits that the Association's claim that because the parties are engaged in negotiations for a successor agreement and because an interest arbitration petition has been filed, the filing of a unit clarification petition somehow indicates bad faith bargaining, citing Madison Teachers, Inc. v. Madison Metropolitan School District, Dane County Cir.Ct. Case #93-CV-3970 (1993), is not supported. It asserts that the court in Madison Teachers, supra, held that the filing of a unit clarification petition is not a prohibited practice. It claims that the court in Madison Teachers, supra, found that the contract contained a contract continuation clause so that processing the unit clarification petition would be a violation of the contract and a prohibited practice. It notes that the court admitted that it could find no case "on all fours" with Madison Teachers, supra, but referred to Boise Cascade Corporation v. NLRB, 860 F.23 471, 129 LRRM 2744 (D.C. Cir., 1988). The District maintains that Boise Cascade, supra, did not deal with a unit clarification petition at all but involved the employer's unilateral change in bargaining units. The District alleges it is not unilaterally altering the bargaining unit but has simply filed a unit clarification petition, which is not required to be filed at any particular time. The District's position is that the court based its decision on a contract continuation clause which is not present in the instant case. The District maintains that a unit clarification petition may be required because 1993 Wisconsin Act 16 amended the definition of a collective bargaining unit and if a collective bargaining unit must be composed entirely of school district professional employes, then a mixed unit, such as exists in Racine, may be repugnant to MERA. The District requests that the complaint be dismissed.

Association's Arguments

The Association contends that there is a factual dispute as to which employes are school district professional employes as well as bargaining history and the history of the bargaining unit. It submits that the District has misinterpreted Madison Teachers, supra, in that the court ruled that it is not a violation of the contract to file a unit clarification petition. It points out that the court did not base its decision on a breach of contract violation. According to the Association, the court based its decision on several factors, namely MERA's anti-fragmentation policy and the public policy that there be continuity in bargaining units in order that there be some stability in bargaining. It refers to the court's statement that when you are in the window period after a contract has expired and in negotiations, to attack the unit would create confusion and make it difficult to proceed with bargaining and under these circumstances, the unit clarification petition constituted bad faith bargaining. The Association claims that the totality of

circumstances must be examined in this case including the District's conduct and timing of the petition. It concludes that the complaint states a claim upon which relief may be granted and the complaint should not be dismissed but a hearing is necessary as there are facts to be clarified.

District's Response

The District contends that the Association has failed to present any reason why the complaint should not be dismissed. It notes that despite the Association's claim that there are facts in dispute, it has failed to identify any material fact which is in dispute. It claims that the Association's arguments about Madison Teachers, supra, confirms that the only issue in this case is a matter of law which can be decided without a hearing. The District admits it filed a petition for unit clarification while the parties are in negotiations after the contract had expired and after it had filed a petition for interest arbitration, thus, the timing of the petition is not in dispute. It further asserts that the Association has not alleged any facts to support its claim that the District engaged in bad faith bargaining. It maintains that the history of the bargaining unit or bargaining history is irrelevant. It further argues that the policy reasons for the court's decision in Madison Teachers, supra, are equally irrelevant. The District agrees that the filing of a unit clarification petition is not a contract violation, nor is it a prohibited practice. The District maintains that the court relied on the contract continuation clause to find a prohibited practice and if the court did not, then the court's decision is even more fundamentally wrong and a clear abuse of discretion. It submits that the Commission should decide whether the District's filing a unit clarification petition constitutes bad faith bargaining as a matter of law, without resort to a hearing, and dismiss the complaint in its entirety.

Discussion

The standard that is applied in deciding a prehearing motion to dismiss a complaint is as follows:

> 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/

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

Although there may be factual disputes with respect to who is or is not a school district professional employe and the history of the bargaining unit, these are all matters that are best resolved in the unit clarification petition. The complaint simply alleges a violation of Secs. 111.70(3)(a)4 and 1, Stats. by the District's filing of a unit clarification petition which is asserted to be bad faith bargaining. Accepting the factual allegations of the complaint as true, the mere filing of a petition for unit clarification, standing alone, is insufficient to establish bad faith bargaining, thus the complaint must be dismissed.

With respect to unit clarification proceedings, the Commission has stated:

> Unit clarification proceedings are not specifically referred to in the Municipal Employment Relations act, but are conducted by the Commission as an adjunct of our jurisdiction over representation disputes under Section 111.70(4)(d), to provide an orderly impartial proceeding for the review of collective bargaining units. This is done in order to relieve labor organizations and Municipal Employers of an area of dispute. 3/

Sec. 111.70(4)(d)5, Stats. provides that questions as to representation may be raised by petition of the municipal employer or any municipal employe or any representative thereof. Thus, the District has the legal right under 111.70(4)(d)5, Stats. to file a petition for unit clarification. Both parties have cited Madison Teachers, supra, extensively and the court held that filing a petition for unit clarification, which a party is legally entitled to do, is not a prohibited practice. 4/ The mere exercise of a legal right without more is not a prohibited practice. In Augusta School District, 5/ the premature filing of a petition for interest arbitration was alleged to be a prohibited practice. It was held in that case that the filing of the petition standing alone was not sufficient to establish a prohibited practice and the complaint was dismissed. Certain other legal rights, such as filing a prohibited practice complaint standing alone would not constitute a prohibited practice. Sec. 111.70(4)(cm)6.e. provides that arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time. Thus, the obligation to bargain or to proceed to interest arbitration is not affected by the filing of a complaint no matter its timing and it standing alone would not establish bad faith bargaining. Sec. 111.70(4)(cm)6.g. does provide for a delay in the proceedings when a

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3/ City of Green Bay, Dec. No. 12682 (WERC, 5/74) at 3.

4/ Madison Teachers, supra, at p. 18.

5/ Dec. No. 27857-A (Shaw, 2/94) aff'd by operation of law Dec. No. 27857-B (WERC, 3/94).

petition for declaratory ruling is filed concerning the mandatory, permissive or prohibited nature of a proposal in a party's final offer. Again, the mere filing of a petition, which potentially could delay matters leading to a successor contract, standing alone, would not establish bad faith bargaining.

It has been asserted in the complaint that the timing of the petition constitutes bad faith bargaining. As stated, supra, there is no requirement that a petition be filed at any particular time. 6/ Sec. 111.70(4)(d)5 provides that where "it appears by the petition that a situation exists requiring prompt action so as to prevent or terminate an emergency, the Commission shall act upon the petition forthwith." This implies that the timing of a petition is not significant as far as bargaining is concerned because the statute provides that the Commission shall act forthwith to prevent or terminate an emergency. No facts are alleged in the complaint about any emergency.

The Association has relied on Madison Teachers, supra, as the basis for its charge of bargaining in bad faith. Contrary to the District's assertion, the court held that it is not a violation of the contract, even if one was in effect, to file a unit clarification petition. 7/ It should also be noted that the court did not find that the filing of the petition for unit clarification was a prohibited practice. The court in the exercise of its discretion enjoined the District from proceeding on its unit clarification petition on the grounds that it would create problems in collective bargaining which would be tantamount to bad faith bargaining. 8/ With all due respect to the court, the court cited no law to support this conclusion. The court mentioned Boise Cascade Corporation v. NLRB, 860 F.2d 471, 129 LRRM 2744 (D.C. Cir, 1988) but that case held that an employer could not unilaterally alter the scope of the bargaining unit, only the NLRB had such authority. The NLRB as well as the Commission has held that the scope of the bargaining unit is not a mandatory

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6/ Milwaukee County, Dec. No. 14786-B (WERC, 4/80) at 6. This states a proposition well established in the Commission's case law, see, for example: Menomonie Joint School District No. 1, Dec. No. 13128-A (WERC, 3/75); Walworth County, Dec. No. 11686, 9394-A (WERC, 3/73); City of Wauwatosa, Dec. No. 11633 (WERC, 2/73); City of Milwaukee, Dec. No. 10835-A (WERC, 12/72); and Wausau School District, Dec. No. 10371-A (WERC, 4/72).

7/ Madison Teachers, at pp. 15, 18 and 25.

8/ Id, at pp. 24 and 25.

subject of bargaining. 9/ Thus, the appropriate method to resolve the scope of the bargaining unit is a unit clarification petition. The complaint has not alleged that the District was unilaterally changing the scope of the bargaining unit but asserted that the District was proceeding with a unit clarification petition which it has the legal right to do. Thus, reliance on Cascade, supra, is totally misplaced. Additionally, the undersigned finds that Madison Teachers, supra, is not persuasive.

9/ Shell Oil Co., 194 NLRB 988 (1972); Sauk County, Dec. No. 18565 (WERC, 3/81).

The Commission is charged with administering MERA and that allows municipal employers to file unit clarification petitions. The mere filing of a petition, standing alone, does not constitute a prohibited practice of bargaining in bad faith. The instant complaint fails to allege any other factors or circumstances which would somehow make the exercise of a right under MERA constitute bad faith bargaining. The Association simply asserts that the filing of the petition for unit clarification at this time constitutes bad faith bargaining. However, this allegation is insufficient to establish a prohibited practice even where the allegations of the complaint are accepted most favorably to the Association. Consequently, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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