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-B

Appearances:

Mr. Anthony L. Sheehan, Staff 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.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND AFFIRMING EXAMINER'S CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS

On March 29, 1994, Examiner Lionel L. Crowley issued Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss in the above-entitled matter. In his decision, the Examiner concluded that the facts alleged by Complainant Racine Education Association did not "state any prohibited practice within the meaning of Secs. 111.70(3)(a)4 or 1, Stats." and he therefore dismissed the complaint against the above named Respondents.

On April 18, 1994, Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received June 2, 1994.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

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

A. The Examiner's Findings of Fact are set aside and the following Findings of Fact are made:

1. (a) At all times material herein, Respondent Racine Unified School (hereinafter the District) is and has been a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. The District's offices are located at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

(b) At all time material herein, the Association is and has been a labor organization within the meaning of Sec. 111.70(1)(h), Stats. The Association's address is: c/o James Ennis, 516 Wisconsin Avenue, Racine, Wisconsin 53403.

2. For the purposes of this proceeding, the Association's representatives are James Ennis, 516 Wisconsin Avenue, Racine, Wisconsin 53403; and Anthony L. Sheehan, Staff Counsel, and Chris Galinat, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, Post Office Box 8003, Madison, Wisconsin 53708-8003.

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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

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.
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> (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.
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> . . .
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> (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.

3. (a) Respondent Board of Education of the Racine Unified School District (hereinafter the Board) is an agent of the District and is charged with possession, care, custody and management of the property and affairs of the District.

(b) At all times relevant hereto Frank Johnson is and has been the Director of Employee Relations and in such capacity acts as the Board's agent.

4. (a) At all time material herein, the Association has served as the exclusive bargaining representative for employes in the District and has maintained an on-going collective bargaining relationship with the District.

(b) The Association was certified as the exclusive bargaining representative for all regular full-time and regular part-time certified teaching personnel employed by the District, but excluding on call substitute teachers, interns, supervisors, administrators, and directors (word omitted) by the Wisconsin Employment Relations Board on April 28, 1965.

(c) The bargaining unit "consists of" many individuals who are "school district professional employe(s)," as defined by Sec. 111.70(1)(ne), Stats. and many who are not. Specifically, at least the following employees, currently in the bargaining unit, do not possess a DPI license pursuant to Sec. 115.28(7), Stats., and/or are not required by their employment to have any such license and therefore are not "school district professional employes":

1 Wellness Coordinator
5 Research Associates
3 Physical Therapists
5 Occupational Therapists
18 Diagnosticians
5 Program Support Teachers
3 At-Risk Coordinators

(d) Most of the positions described above in Paragraph 4(c), have been voluntarily recognized by the parties for inclusion in the bargaining unit for approximately 20 years.

(e) The bargaining unit described above in Paragraphs 4(b) and (c) has been determined to be appropriate for collective bargaining purposes for

approximately 20 years.

5. (a) The District and the Association have maintained and enforced a series of collective bargain-ing agreements which govern the wages, hours, and other working conditions of the employees in the bargaining unit for approximately 20 years. The most current agreement expired on August 24, 1992.

(b) The Association and the District exchanged initial offers for a successor contract for the period 1992-94 in July of 1992. The parties then met for bargaining on at least nine occasions.

(c) 1993 Wisconsin Act 16, which substan-tially changed the Municipal Employment Relations Act, became effective on August 12, 1993.

(d) The District filed for interest arbitration pursuant to Sec. 111.70(4)(cm), Stats., in January 1993.

(e) The District filed a unit clarific-ation petition with the Commission on January 14, 1994. The District seeks to have non "School district professional employes" separated from the existing bargaining unit and put into a separate unit.

6. (a) At no time prior to the January 14, 1994 filing of the petition did the District ever raise the issue of the appropriateness of the existing bargaining unit.

(b) The Respondents seek to clarify the existing bargaining unit solely to come under certain provisions of Act 16 allowing the District to avoid interest arbitration if it makes a qualified economic offer and to unilaterally implement its qualified economic offer upon deadlock.

B. The Examiner's Conclusion of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe is presently serving as investigator of an interest arbitration petition involving the parties to this proceeding and did not participate.

MEMORANDUM ACCOMPANYING ORDER MODIFYING
EXAMINER'S FINDINGS OF FACT AND AFFIRMING
EXAMINER'S CONCLUSION OF LAW AND
ORDER GRANTING MOTION TO DISMISS

The Complaint

In its complaint Racine Education Association asserts the following:

7.

By the acts and conduct described above in paragraphs 5(e) and 6(b) Respondents have violated Sec. 111.70(3)(a)1 and 4, Wis. Stats.

Paragraphs 5(e) and 6(b) of the complaint state:

5.

. . .

(e) The District filed a unit clarification petition with the Commission on January 14, 1994. The District seeks to have non "School district professional employes" separated from the existing bargaining unit and put into a separate unit.

6.

. . .

(b) The Respondents seek to clarify the existing bargaining unit solely to come under certain provisions of Act 16 allowing the District to avoid interest arbitration and to unilaterally implement its economic offer without bargaining.

. . .

The Examiner's Decision

The Examiner granted Respondent's pre-hearing motion to dismiss the complaint. He recited the following as the standard by which a pre-hearing motion to dismiss is to be measured:

> 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.

He concluded that:

> 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.

The Examiner's Memorandum stated in pertinent part:

> 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.
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> 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

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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).

> 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 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.

The Commission is charged with administering MERA and that allows municipal employers to file unit clari-fication petitions. The mere filing of a petition, standing alone, does not constitute a prohibited prac-tice 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 clari-fication 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 Associ-ation. Consequently, the complaint has been dismissed in its entirety.

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

8/ Id, at pp. 24 and 25.

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

POSITIONS OF THE PARTIES

Complainant

Complainant contends the Examiner erred by failing to correctly apply the standard applicable to a pre-hearing motion to dismiss. Complainant asserts there are obvious factual disputes between the parties as to the timing and motivation for filing the petition which must be resolved to determine whether bad faith bargaining occurred.

Complainant further argues the Examiner was legally bound to follow the decision of the Dane County Circuit Court in Madison Teachers, Inc. v. Madison Metropolitan School District. Complainant asserts the Examiner was obligated to follow this legally binding precedent by a court with concurrent jurisdiction over prohibited practice complaints.

If the Examiner was not bound by Madison, Complainant contends in the alternative that Madison constitutes persuasive precedent. Complainant argues the Madison decision stands for the proposition that while it is generally true that a unit clarification petition may be filed at any time, in a particular situation the totality of circumstances may warrant a finding that a filing constitutes bad faith bargaining. Complainant argues that the circumstances present here establish the filing was bad faith bargaining. Complainant asserts that where, as here, the District is clearly using the unit

clarification petition to deprive employes of access to interest arbitration, the filing constitutes bad faith bargaining. If the District truly believed the existing unit was repugnant to Act 16, the Complainant asks why the District waited five months to file the unit clarification petition and continued to participate in the investigation of the District's interest arbitration petition.

Given the foregoing, the Complainant asks that the Examiner be reversed.

Respondents

Respondents contend Complainant has failed to identify any material issues of fact which require a hearing and that the facts pled by Complainant do not constitute a prohibited practice. Respondents argue that even assuming its sole motivation for filing the petition was to take advantage of the "qualified economic offer" provisions of Act 16 and even assuming that it did not question the propriety of the existing unit prior to filing its petition, no violation of the duty to bargain is established.

Respondents allege the Examiner was not legally bound by the Madison case, noting the Commission was not a party to that proceeding and the absence of any citations from Complainant to support the argument that Madison is binding legal precedent. Respondents further contend that the Examiner correctly determined that the Madison rationale and analysis was not persuasive.

Given the foregoing, the Respondents ask the Commission to affirm the Examiner.

DISCUSSION

As correctly held by the Examiner, a pre-hearing motion to dismiss can only be granted where the facts pled in the complaint would not establish the prohibited practice alleged. 2/ True to this standard, we have adopted the facts pled by Complainant 3/ as our findings for the purposes of our review. Reviewing the facts pled, we conclude these facts do not establish bad faith bargaining. 4/

2/ Moraine Park VTAE, Dec. No. 25747-D (WERC, 1/90); Unified School District No. 1 of Racine County, Dec. No. 15915-B (Hoornstra, with final authority, 12/77).

3/ The only exceptions are Findings 5 (c), 5 (d) and 6 (b). In Finding 5 (c) we correct that portion of the complaint which incorrectly asserts Act 16 became effective on July 1, 1993. As Complainant agrees in its brief, Act 16 became effective August 12, 1993. In Finding 5 (d) we correct that portion of the compliant which incorrectly asserts the interest arbitration petition was filed in December 1993. As the parties subsequently stipulated, the petition was in filed in January 1993. In Finding 6 (b) we more accurately specify the Act 16 derived rights asserted.

4/ Complainant criticizes the Examiner for failing to accurately portray Complainant's position when he stated:

> . . . The mere filing of a petition, standing alone, does not constitute a prohibited practice of bargaining

The critical fact upon which Complainant relies is that Respondents' sole motivation in filing the petition was to seek to avoid interest arbitration and to acquire the option of implementing a qualified economic offer. For the filing of a unit clarification to produce this result, it would have to be assumed that: (1) interest arbitration restrictions in Act 16 do not apply to bargaining units which include both "school district professional employes" and non "school district professional employes;" (2) interest arbitration restrictions in Act 16 do apply to units which include only "school district professional employes;" (3) the existing "mixed" unit at issue herein will be clarified to exclude non "school district professional employes;" and that (4) following such a clarification, Act 16 interest arbitration restrictions will be applicable to newly clarified unit of Racine "school district professional employes." Assumption (1) continues to be litigated in Madison; assumption (3) is being litigated before us in the unit clarification proceeding, Racine Unified School District Case 1 and to some extent in Madison; and a reading of the Complainant's brief makes it apparent that Complainant does not concede assumption (4).

In effect, Complainant asks us to conclude that a party engages in bad faith bargaining when it asks an administrative agency (the WERC) a question (through filing a unit clarification petition) which if resolved in the questioners favor will give that party access to statutory rights which will enhance the party's bargaining position. We do not find such a scenario constitutes bad faith bargaining. As argued by Respondents, engaging in activity whereby a party seeks to exercise a statutory right is not bad faith bargaining. 5/

Complainant argues we must reverse the Examiner because we are bound by the holding in Madison. 6/ Complainant did not cite any judicial opinion in

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> 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. . . .

We think the Examiner's statement does reflect a consideration of the filing in the context of the circumstances alleged. In any event, on review, our consideration of the complaint is in the context of the "totality" of the circumstances alleged.

5/ To the extent it is argued Respondents should have sought their statutory advantage sooner and that the delay demonstrates bad faith, we would note that the need to seek to clarify the existing unit to gain the benefit of Act 16 only became apparent in December 1993 when Madison was decided and that the District filed its petition in January 1994.

6/ Complainant correctly points out that in Madison, Judge Nichol's Conclusions of Law include the following:

4(f)Such conduct by the District constitutes a failure to

support of its position. The judicial authority of which we are aware holds that we are not required to follow a circuit court decision. In West Bend Education Association v. WERC, Dec. No. 81-CV-294 (CirCt Washington, 4/83) Circuit Judge Dancey held in pertinent part:

> An unreversed circuit court decision in this state rules only the particular case in which it was rendered. Neither statute nor case law nor custom nor Supreme Court rule give it precedential value as to other cases; nor is the Commission required to follow such a decision in other matters particularly where, as here, it has been appealed from.

Thus, even assuming that the Madison holding could not be factually distinguished from the facts herein, we conclude we are not bound by the holding in Madison in this proceeding.

Nor do we find Madison to be persuasive precedent. The law defining "collective bargaining units" and the scope of interest arbitration rights changed while the parties in Madison and Racine were bargaining a contract. The change in the law raised bona fide questions as to whether the existing units continued to be appropriate and what interest arbitration procedures applied. Change in the law in the midst of a bargain is inherently disruptive. However, the disruption was caused by the legislature, not the employer. Under such circumstances, the employer can hardly be faulted for asking the agency responsible for administering the new law whether the change impacts on the parties' existing unit.

Given all of the foregoing, we have affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 23rd day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

Chairman A. Henry Hempe is presently serving as investigator of an interest arbitration petition involving the parties to this proceeding and did not participate.

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bargain in good faith and is a prohibited practice in violation of sec. 111.70(3)(a)4, Stats.