STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE UNIFIED SCHOOL DISTRICT, Complainant, vs. RACINE EDUCATION ASSOCIATION, Respondent.	Case 133 No. 50636 MP-2864 Decision No. 27986-B

Appearances:

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, and Mr. Douglas E. Witte, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District.

Hanson, Gasiorkiewicz & Weber, S.C., by Mr. Robert K. Weber, and Mr. Brian Wright, 514 Wisconsin Avenue, Racine, Wisconsin 53403, appearing on behalf of the Racine Education Association.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'SFINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 15, 1994, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Racine Education Association had not committed prohibited practices within the meaning of Sec. 111.70(3)(b)3, Stats. He therefore dismissed the complaint.

On October 5, 1994, the Complainant Racine Unified School District 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 briefs in support of and in opposition to the petition, the last of which was received November 18, 1994.

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

ORDER 1/

A. Examiner's Findings of Fact 1 and 2 are affirmed.

B. Examiner's Finding of Fact 3 is set aside and the following Finding of Fact is made:

> The Association is the exclusive collective bargaining representative for certain professional employes of the District.

C. Examiner's Finding of Fact 4 is affirmed.

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 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.

(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

(footnote 1 continues on page 3)

(footnote 1 continued from page 2)

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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.

(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.

. . .

(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.

D. Examiner's Findings of Fact 5 and 6 are set aside and reversed and the following Findings are made:

> 5. At the suggestion of WERC Mediator Hempe and School Board President Garnett, Superintendent Armstead and Executive Director Ennis agreed to meet December 17, 1993 to discuss issues related to year-round schools. Armstead brought members of the District's administrative staff to the meeting, including the District's principal collective bargaining spokesperson, Frank Johnson. Ennis brought two unit members with him, one of whom is the Chairperson of an Association Committee whose responsibilities include "managing" bargaining and drafting bargaining proposals. Ennis is the Association's principal collective bargaining spokesperson.
>
> At the beginning of the meeting, Ennis objected to the presence of certain District staff and advised Armstead that he would not meet if Johnson was allowed to participate. Armstead advised Ennis that he felt Johnson should be present at any meeting regarding "labor negotiations". Johnson told Ennis that Ennis' position was a "prohibited practice".
>
> Armstead and Ennis then met in the hallway, and it was agreed that Johnson could be present but could not speak. Armstead agreed that Johnson could not speak because Ennis would otherwise have refused to meet. The meeting was important to Armstead because:
>
> > A Because I did want the dialogue to -- to continue, we were very, very anxious to get on with the business of deciding what position the R.E.A. had, to analyze those positions, to find out what positions the District had, to see where we had some room for agreement and where we were far apart, so that we could begin to address those concerns and issues in a -- pretty much an organized, intelligent way. And I was willing to compromise, because I did not want to see the discussions break down to the point where we would -- we were not having any dialogue.

The meeting then proceeded. Johnson's notes of the meeting state the following:

10:35 a.m., December 17, 1993

Present for REA: James Ennis, Dennis Wiser, Sue Spicer

Present for RUSD: Major Armstead, Jr., Rita Applebaum, Jetha Pinkston Lawson, Delbert Fritchen, Frank Johnson (Ennis would not meet unless there was agreement that Johnson will not talk)

Ennis — If we hear anything about this in bargaining, we will destroy year-round school.

We need contract settlement before we agree to year-round.

Armstead — There should be joint public statements between Jim and myself.

This should set stage for subsequent meetings.

This is not bargaining but where do we have areas of agreement and concern on calendar then we can go back to our respective groups.

Jim and I have had several one-on-one conversations on this and will continue.

Let's talk about teacher assignments

Ennis — Should be volunteers and if not enough then we will set up

	mechanism to staff the positions.
	If year-round succeeds, it should be expanded to other schools.
	What happens when team leader on intersession?
	Named several track problems with staffings
	What's the advantage to the teacher to go year-round
Applebaum	Might be teaching two of those weeks during intersession--summer school
Armstead	Teacher could teach additional 30 days
Ennis	It would be paid a full days pay just like extension of calendar.
Armstead	I would think it would be like summer school pay
Ennis	It won't fly if its just 187 days spread out over 360 days.
Fritchen	Enrollment will start end of January.
Ennis	When do we get to "go or no go" decision?
	Out interest is to get a labor contract. Now that Madison settled, we have a good idea how to get one so in January we will be working hard on this. (Smile on his face.)
	Abandonment of year round and restaffing procedures need to be

determined.

Fritchen We need enrollment to see. We are planning as if its a go.

Ennis.	We see 120 teachers as being impacted. North Park is organizing against year-round school. You need to give us "solid" dates. Once you decide how you are going to staff school, teachers will not be your enemy. REA president is running around saying year-round is worst thing he's ever seen. I committed to Major we will not stop it. (year-round) You don't like word "bumping" but... We will agree it bumping. How do you propose intersession? How do you get on track?
Armstead	Fair way to do that--take first come first serve then close out--then go to next choice. I don't know why rotation system could not be established--change year to year--that's just one way. Maybe you have other ideas. We want balance---strong, week teachers on separate cycles.
Ennis	(Argued against rotation)
Fritchen	Question if somebody is off in February and we have need for 3 teachers, where would you see it?

Ennis	Most senior pick vacation just like the firefighters.
Applebaum	Suggested way to select tracks.
Ennis	Teachers need guarantee on how the selection works.
Armstead	I guess that's not a good idea I cam up with (rotation).
	We want good service to kids.
Ennis	We can guarantee that but it will cost you language.
	The language must be system-wide.
	Frank will go from gray to bald.
Fritchen	If it doesn't work what...
Ennis	We may ask in guarantee that if it goes that way also need to know how to unwind.
Ennis	Eight paychecks in two months will get check earlier.
	If goes back to *regular* school, it will change.
Armstead	Preference for them to get out?
Ennis	No
	(Major left the room)
Fritchen	Year-round person can get out by posting for traditional jobs.

Ennis Current language is a problem.

Fritchen	For example, team leaders--look at number of days x current rate. Expand days and continue rate calculated above; 2 persons share that role; same thing with subject area reps.
Ennis	How would you schedule librarian and social worker in elementary school?
Fritchen	One way is to have 2 people do job; 180 to 240 day. Second way is to work traditional calendar then open up time for other to do for extra pay.
Applebaum	Four day staffing is not what we propose.
Fritchen	Third way is when full time person not used, open the position up to that person or others on a daily basis.
Ennis	How about specialists?
Fritchen	Lots of different ways
Ennis	What do you guys want to do?
Fritchen	(Explains way for specialists to work.)
Ennis	Says teachers should work straight year then with 40 day vacation. Could work in summer time and get 20 <u>full days</u> pay.
Fritchen	<u>Full days</u> pay will have to be discussed.
Ennis	No way must be full days pay

Fritchen — Another concept: need speech pathologist two days; ways to provide as we do now.

Ennis — That area's real simple.

Fritchen — Intramural person come back during intersession.

Ennis — Is opposed that coach would have to come back during intersession to finish job.

(Major returned)

Ennis — All intramural things still need to be done.

Let's take a 10 minute break and work to 12:30.

(break - 11:45) (start - 12:05)

Ennis — At end of 60 days, teacher conference; 3 different times.

Applebaum — We need John Aceto on the calendar.

Armstead — Shall we bring him in?

Ennis — No.

Snow days - if year-round doesn't do it why should we?

Pinkston Lawson — We will make up snow days.

Ennis — What are you guys willing to give to teachers to get this pilot?

6 day week is different than making

	up snow days
	In year-round, snow days won't work.
	We can eliminate records days since they are teacher days only. Unless we go to 3 record days.
	Without advocacy period, how do we conference?
Armstead	We need to talk to principals on that.
Ennis	Advocacy is "piece of crap."
Armstead	Board will pay one prep time only.
Ennis	Board isn't paying anything.
Armstead	It's being paid for time not working.
Ennis	We increased our hours of work with change, we could go back to 52 minute teaching period but would have 52 minute lunch and study resource center.
Armstead	We can think about it.
Ennis	Would there be trimester grades?
Armstead	Yes.
Ennis	Will middle schools have access to academy during summer session?
Applebaum	Good question--don't know.
Ennis	Disciplinary transfers on one track to go back to traditional school?
Pinkston	Put on another track?

Lawson

Ennis — You're not ready to start year-round next year if you're still working on this stuff.

I don't want to answer teachers or parents that nobody has made up their "god damn mind."

Fritchen — We can answer these questions but we will need to bring in special people on some of these things.

Ennis — Until teachers know what will happen for sure, they are "tubing" you.

You have not seen the last of Gilmore mothers.

How do specialists work in trimester?

Foreign language is a big teacher concern.

What about Christmas programs?

When in January will it all be out so parents and staff know?

Fritchen — Yes, in January then enrollment completed at end of January.

Ennis — We say don't continue working with existing staffs.

We don't want coordinator position--administrator job.

We would rather have extra teachers in each school to give days off for inservice, etc.

Armstead The two building principals want to sit in on these meetings.

Ennis Tell the two principals to quit "fucking with our union." "Excuse me Rita"

Armstead I just brought it up because the two principals asked that they be allowed to set in.

Ennis Teachers who are not in leadership are playing games.

For principals to stay there is difference between the REA and teachers is offensive.

Question of who would be "head teacher" at Janes has already been determined.

Armstead How about another meeting next Wednesday.

Ennis No, because of Sue and Dennis rest of staff would have them.

Armstead After Tuesday meeting at Gilmore, maybe we would know more.

Ennis I know how hard this is from administration standpoint but that's why we're here.

We have a contract to settle.

People to schedule.

People to make plans.

Until hard decisions are made,

Gilmore people will not give you valid information.

Janes people you are receiving personal interests not valid information.

P-5 and year-round-great for Janes; slap at Wadewitz.

Armstead What goodies can we offer teachers to accept year-round.

Ennis Lots of things.

Armstead Can we call you Wednesday and set up a time? I would like Wednesday meetings.

Ennis No; we need bargaining.

Armstead Board will Negotiate.

Ennis They do? They never show up. We can wait to bargain. This won't go without bargaining. Can't drag on--its tearing people up.

Armstead What now?

Ennis How do people get summer jobs? Three tracks over 365? Janes thinks one track parents aren't going to drive works schedules of teachers.

On middle schools, what is class size going to be?

We would come back if there are answers.

During the December 17, 1993 meeting, the parties engaged

in collective bargaining over both mandatory and permissive subjects of bargaining.

6. At the March 1, 1994 suggestion of WERC Mediator Hempe, Armstead and Ennis agreed to meet on March 4, 1994 to discuss whether there were bargaining issues which could be resolved through adoption of administrative policies or regulations by the District.

After the meeting was scheduled, but prior to March 4, 1994, the District filed a prohibited practice complaint with the WERC alleging Ennis' conduct during the December 17, 1993 meeting violated Sec. 111.70(3)(b)3, Stats.

Ennis met Armstead briefly on March 4, 1994, but indicated that he would not proceed to discuss the planned topic because he believed he would be engaging in the same conduct which had prompted the District's prohibited practice complaint. Ennis then left.

A March 7, 1994 letter to Mediator Hempe from Johnson stated:

> Dear Mr. Hempe:
>
> RE: March 1, 1994 Mediation Session
>
> This is a follow-up to our last mediation session held on March 1, 1994.
>
> As you will recall, the meeting ended with the understanding that the REA would select a number of bargaining proposals and submit them to the District for consideration by the Superintendent as administrative regulations. Jim Ennis, in keeping with that understanding, set up an appointment with Superintendent Armstead for Friday afternoon, March 4, 1994. Mr. Ennis appeared for the appointment but did not discuss the selection of any bargaining proposals for consideration as administrative regulations. He indicated that a recent prohibited practice filed by the District prohibited him from meeting with the Superintendent, therefore, as long as such prohibited practice remained active, he would not meet. He then left the office.

In order to alleviate Mr. Ennis' concerns, it would be appreciated if you would ask him to send me a list of REA proposals that he thinks appropriate for inclusion in administrative regulations and I, in turn, will pass those on to the Superintendent for his review. This understanding was to be an important part in your effort to reduce the bargaining issues to a more manageable level. Without it, a voluntary agreement becomes more difficult.

If the REA is unwilling to do this, it is the request of the District that you set another mediation session or formally call for final offers.

Sincerely,

Frank L. Johnson
Director of Employee Relations

cc: Major Armstead, Jr., Harry Garnette, Marie Rasmussen, James Ennis, Robert Weber

A March 16, 1994 letter to Mediator Hempe from Attorney Weber stated:

RE: March 1, 1994 Mediation Session

Dear Chairman Hempe:

Mr. Ennis has requested that I respond to Frank's letter of March 9, 1994 (attached).

It is true that Mr. Ennis was aggrieved by the recent prohibited practice charge referred to in Frank's letter inasmuch as he perceived the December, 1993 meeting with the superintendent to be essentially the same as the March, 1994 meeting.

Frank's current suggestion of having you act as an intermediary between the superintendent and the executive director would appear to frustrate the

purpose of the meetings in the first place.

I would note, in response to Frank's direct questions, that secs. 12 and 14 do appear capable of being handled through mutually agreeable administrative regulations -- as does part of section 10.

In view of our experience, however, Mr. Ennis would like some assurance that he will not be charged for meeting on these matters (or any other matters of mutual concern) with the superintendent.

Thank you for your effort, help and courtesy.

Yours very truly,

Hanson, Gasiorkiewicz & Weber, S.C.

Robert K. Weber

RKW/sam
cc: Frank Johnson, James Ennis

The March 4, 1994 meeting was for the purpose of collective bargaining over mandatory and permissive subjects of bargaining.

E. Examiner's Conclusion of Law 1 is set aside and reversed and the following Conclusion of Law is made:

1. The Association violated Sec. 111.70(3)(b)3, Stats., when its agent, James Ennis, refused to participate in a December 17, 1993 meeting with the District if the District's principal bargaining spokesperson, Frank Johnson, was allowed to participate.

F. Examiner's Conclusion of Law 2 is affirmed as modified herein:

2. The Association did not violate Sec. 111.70(3)(b)3, Stats., when its agent, James Ennis, left the meeting with District

Superintendent Armstead on March 4, 1994.

G. The Examiner's Order dismissing the complaint as to Ennis' conduct on March 4, 1994, is affirmed.

H. The Examiner's Order dismissing the complaint is set aside as to Conclusion of Law 1 and the following Order is entered.

ORDER

IT IS ORDERED THAT the Racine Education Association, its officers and agents, shall immediately:

1. Cease and desist from refusing to bargain in good faith with the Racine Unified School District within the meaning of Secs. 111.70(1)(a) and (3)(b)3, Stats.

2. Take the following affirmative action which the Wisconsin Employment Relations Commission finds will effectuate the purposes of the Municipal Employment Relations Act.

A. Consistent with its duty to bargain in good faith, the Racine Education Association shall provide the District with the Notice attached hereto and marked "Appendix A."

B. Notify all employes in the bargaining unit by posting in conspicuous places on the District's premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." The Notice

shall be signed by an authorized representative of the Racine Education Association and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Racine Education Association to insure that said Notices are not altered, defaced or covered by other material.

C. Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps it has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of April, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner A. Henry Hempe did not participate.

APPENDIX A

NOTICE

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify the Racine Unified School District that:

> WE WILL NOT refuse to bargain in good faith with the Racine Unified School District by interfering with the District's decisions as to who will represent the District for the purposes of collective bargaining.

RACINE EDUCATION ASSOCIATION

By _____

Dated this ____ day of _____, 1996.

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING IN PART AND REVERSING IN PART
EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Pleadings

The District alleged that the Association violated its duty to bargain in good faith and thus committed prohibited practices within the meaning of Sec. 111.70(3)(b), Stats., when Association agent Ennis refused to participate in a December 17, 1993 bargaining session if District spokesperson Johnson was allowed to participate and when Ennis refused to meet with District Superintendent Armstead for a March 4, 1994 bargaining session.

The Examiner's Decision

The Examiner's decision contained the following analysis of the dispute.

> DISCUSSION
>
> Section 111.70(3)(b)(3) provides that it is a prohibited practice:
>
> > 3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified collective bargaining representative of employees in an appropriate collective bargaining unit.
>
> In Unified School District No. 1 of Racine County, Dec. Nos. 13696-C and 13876-B (Fleischli, 4/78), the Examiner found that the Association violated Section 111.70(3)(b)(3), by refusing to bargain with the District's labor negotiator unless the District Board also attended the bargaining meetings. The Examiner stated that the composition of the party's bargaining team is a permissive subject of bargaining, and, ". . . it is a prohibited practice for either party to refuse to meet with the other party's duly authorized representative or representatives . . ."
>
> The District's complaint is based on the refusal of Mr. Ennis

to allow Mr. Johnson to participate in the meeting of December 17, 1993, which had been arranged between Mr. Ennis and Superintendent Armstead. 2/ Mr. Ennis understood that this meeting was to be solely for the purpose of an information discussion, with no bargaining to occur. 3/ This was the reason he refused to allow Mr. Johnson, the District's chief negotiator, to participate. 4/ Similar informal meetings had taken place between Mr. Ennis and Mr. Armstead in the past. 5/ The evidence failed to establish that this meeting was different from these past informal meetings. Mr. Ennis' position was in accordance with his letter to Mr. Johnson dated November 29, 1993. 6/ The notes of the meeting indicate that Superintendent Armstead stated this meeting was not bargaining. 7/ The District argued that the parties had met to bargain on single issues in the past but there was no evidence that the parties agreed to do so on year round education in this instance. This is supported by the fact that Mr. Ennis did not bring the Association's bargaining committee to the meeting. The District does not contend that Mr. Ennis had ever tried to prevent Mr. Johnson from participating in any meeting which Mr. Ennis had understood to be for the purpose of bargaining.

These facts fall short of those involved in Racine, supra, relied upon by the District. There, the Association refused to participate in meetings which it clearly understood to be for the purpose of bargaining, unless District Board members participated personally, along with the negotiator. Here, Mr. Ennis understood that the meeting was intended solely as an informal discussion meeting, rather than a bargaining session.

The Examiner concludes that the actions of Mr. Ennis did not constitute an effort by him to interfere with the District's right to select its own bargaining representatives or a refusal to meet with the District's fully authorized representatives in bargaining.

2/ Tr. II -245.

3/ Ex. 19, Tr. II - 256.

4/ Tr. II - 247.

5/ Tr. II - 253-254.

6/ Ex. 19.

7/ Ex. 66.

The District contends that the Association also breached its duty to bargain in good faith when Mr. Ennis withdrew from the meeting arranged at Mediator Hempe's suggestion between him and Superintendent Armstead for March 4, 1994, because the District had filed the instant prohibited labor practice action against him in the interim. 8/ It is not clear from the record but it appears that this meeting was for purposes of narrowing issues in bargaining. However, Mr. Johnson, the District's negotiator, was not present for this meeting. 9/ Under the circumstances, it cannot be concluded that Mr. Ennis' refusal to meet with Superintendent Armstead in the absence of Mr. Johnson to discuss bargaining items, in light of the complaint relating to his insistence that Johnson not participate at the December 17, 1993 meeting, constituted a refusal to bargain in good faith. Thus, the complaint has been dismissed in its entirety.

8/ Tr. II - 249-250.

9/ Mr. Johnson is the only one authorized by the District's Board to negotiate collective bargaining agreements with the Association. (Tr. I-29).

Positions of the Parties

The District

The District contends that the Examiner's decision should be reversed because he erroneously concluded that neither the December 17, 1993, nor March 4, 1994, meetings were for the purpose of collective bargaining. The District asserts that the Examiner's conclusion in this regard not only ignores the evidence in the case but also sets a "potentially fatal precedent" concerning the duty to bargain.

The District argues the Examiner's decision allows one party to unilaterally determine who the other party can choose to negotiate on its behalf, how meetings will be structured, and what subjects will be discussed. The District asserts that such a unilateral arrogation of authority in the context of collective bargaining directly conflicts with the duty to bargain in good faith.

The District contends that the December 17 meeting was established so the District could provide the Union with requested information regarding year-round schools. The District argues that there was no mutual understanding or agreement between the parties that the meeting would not constitute negotiations, and further that a decision maker must look at what the parties planned to do at the meeting to determine whether it was for the purpose of collective bargaining. Here, the District asserts that the exchange of information sought by the Union clearly places the meeting within the context of the collective bargaining process. The District contends that the Association's effort to portray the meeting as "informal" does not change the purpose of the meeting.

Alternatively, the District asserts there should be a presumption that when a union and employer meet, they are meeting to negotiate as to some facet of their collective bargaining relationship.

The District argues that the March 4 meeting was also for the purpose of collective bargaining. It contends the record clearly establishes that the meeting was called for the purpose of removing issues from the bargaining table. The District argues that the Association's refusal to meet because the District had filed a prohibited practice complaint is not a valid reason to behave in such a fashion.

The District concludes its initial brief as follows:

> The Association's actions, both prior to and subsequent to the hearing show that it has one thing in mind with respect to negotiations. It wishes to dictate who can negotiate for the District and what topics will be negotiated. Such choices are not within the Association's province. Pursuant to MERA, those choices are left to the District. The Association's attempt to interfere with the District's selection of its bargaining representatives constitutes a prohibited practice within the meaning of sec. 111.70(3)(b)3.
>
> This is not the first time Ennis has tried to end-run the District's agent. Cf. Unified School District No. 1 of Racine Count, Decision Nos. 13696-C and 13876-B, slip op. at 138 (Fleischli, 1978). Under the Examiner's decision, it would be the first time Ennis has state government sanction to do it. There can be no proper "feeling" that this complaint should be dismissed just because "Ennis

> is Ennis", or because "Racine is Racine". The Examiner's decision permits any party to say, I will meet about that mandatory subject of bargaining at such and such a time if, but only if, I can control who is present and who speaks for the other side, or if, but only if, you will agree that meeting is not bargaining. If any union or any employer can legally insist on either of those ploys, then the law which protects the right of employee groups and employers to select their own agents free of coercion by the other party is at an end.
>
> The District respectively submits that the Examiner's Findings of Fact and Conclusions of Law should be reversed and that the Commission grant the relief requested in the District's complaint.

In its reply brief, the District urges the Commission to reject the Union's attempt to present a number of rationalizations as to what Ennis must have been thinking or what he meant when he refused to allow Johnson to participate in the December 17, 1993 meeting. The District contends that these after-the-fact speculations are irrelevant. The District notes that Ennis could have but did not testify at the hearing. The District further argues that simply because the Association prefers to deal with the Superintendent instead of Johnson does not give the Association the right to dictate who is present on behalf of the District for collective bargaining. The District contends that the Association's attempt to focus on the "informal" relationship between Ennis and the Superintendent is no more than an effort by the Association to distract the Commission from the real issues in this case. Whether "formal" or "informal", the District asserts that it is the purpose of the meeting which should control the determination of whether it was a collective bargaining session.

The District urges the Commission to draw an adverse inference from Ennis' failure to testify regarding the events of December 17 and March 4. The District contends that it is significant that Ennis never refuted Johnson's testimony to the effect that Johnson advised Ennis that it was a "prohibited practice" for Ennis to ask Johnson to leave the December 17, 1993 meeting. If Ennis believed the meeting was not for the purpose of collective bargaining, the District asks why didn't he explain to Johnson why no prohibited practice was being committed.

The District concludes its reply brief as follows:

> The District submits the Examiner's decision in this case must be reversed. If allowed to stand, unions and school districts throughout the state can thumb their nose at the requirements found in MERA that each party be able to select its own bargaining representatives. The fact that this case involves Racine should not change that fact. By that statement, the District does not question either the Examiner's or the Commission's integrity. However, cursory review of the WERC Digests and opinions over Mr. Ennis' tenure the last 20 or so years shows that the Racine Education Association and the District, whoever the District's representatives have been over those 20 years, have had a stormy relationship. This

stormy relationship does not excuse Mr. Ennis' conduct in this case.

Nor is the District suggesting Mr. Ennis is some sort of "country bumpkin" who needs special treatment from the Commission. Mr. Ennis is an experienced negotiator who knows the system and attempts to play the system for everything it's worth, to his advantage.

Permitting the Association to get away with what it has done in this case would simply obliterate a portion of the bargaining statute in Wisconsin. The District submits that as a matter of law the two meetings at issue in this proceeding were bargaining meetings and that by refusing to meet with the District's chosen negotiators the Association has violated Sec. 111.70(3)(b)3, Stats.

The Association

The Association urges the Commission to affirm the Examiner. The Association contends that the Examiner's Findings are based upon a close examination of the record which establishes that the two meetings in question were simply part of an ongoing informal dialogue between Ennis and Armstead on issues of mutual concern. The Association argues that the record clearly establishes that the meetings were not for the purposes of collective bargaining.

The Association notes that it had repeatedly advised the District that it would not bargain separately about year-round schools. The Association contends that the District has the burden of proof in this proceeding and that it is inappropriate to draw any inferences from the District's decision not to call Mr. Ennis as a witness.

The Association contends that Ennis has worked diligently through the regular collective bargaining process to arrive at a successor labor agreement and that the District's claims to the contrary are untrue. The Association further contends that District arguments regarding "Ennis is Ennis" or "Racine is Racine" insult the Examiner, the Commission, Ennis and the citizens of Racine.

Given all the foregoing, the Association asks the Commission to affirm the Examiner's decision.

DISCUSSION

Section 111.70(1)(a), Stats., defines collective bargaining as the "performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with the intention of reaching agreement, or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment . . ."

The ability of a union or employer to select the members of a bargaining team without interference from the other party is critical to the collective bargaining process. Among other reasons, this is so because the composition of the team is "central to the strategic control each party must have over how it pursues a bargaining agreement." 2/

2/ Waunakee Community School District, Dec. No. 27837-B (WERC, 6/95).

Given the critical importance of this right, Sec. 111.70(3)(b)3, Stats., makes it a violation of law for a union to "refuse to bargain collectively with a duly authorized officer or agent of a municipal employer ..." 3/

Here, we are satisfied that there was some uncertainty in the parties' minds as to whether the December 17 meeting was for the purpose of collective bargaining. We note, for instance, that neither side was represented at the meeting by its normal bargaining team.

However, we are also satisfied that the meeting ultimately evolved into collective bargaining over both mandatory and permissive subjects of bargaining related to year-round schools. Given the evolution of the meeting and the critical nature of the right to control the identity of one's own bargaining team, we are persuaded that Ennis' insistence on Johnson's exclusion and/or silence during the December 17 meeting violated Sec. 111.70(3)(b)3, Stats. While the violation may not have been intended, we think the right in question is so important that any intrusion violates the law.

As to the meeting of March 4, 1994, we are persuaded that Ennis' conduct (as set forth in Finding 6) can most reasonably be viewed as an effort to avoid an additional violation of Sec. 111.70(3)(b)3, Stats. Under these circumstances, we find no violation as to that meeting.

In light of the finding of a violation, we have entered a remedial Order we think to be appropriate under the purposes of the Municipal Employment Relations Act. In light of our decision herein, it is not necessary for us to rule upon the District's Motion to reopen the record. 4/

Dated at Madison, Wisconsin, this 15th day of April, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

3/ Section 111.70(3)(a)4, Stats., contains a similar prohibition against employer interference with the composition of a union bargaining team.

4/ We have, however, granted the District's motion to correct transcript.

Commissioner A. Henry Hempe did not participate.