

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME,
AFL-CIO, AND ITS AFFILIATED LOCAL 1486,

Complainant,

vs.

SCHOOL DISTRICT OF NICOLET,

Respondent.

Case 41

No. 54741 MP-3256

Decision No. 28991-A

Appearances:

Mr. David B. Kern, Quarles & Brady, Attorneys at Law, 411 East Wisconsin Avenue,
Milwaukee, WI 53202-4497.

Mr. Robert E. Haney, Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, 611 North
Broadway Street, Suite 200, Milwaukee, WI 53202-5004.

ORDER DENYING MOTION TO DISMISS

Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 1486, herein referred to as the Complainant or Union, filed a complaint on December 17, 1996 with the Wisconsin Employment Relations Commission alleging that the School District of Nicolet, herein referred to as the Respondent or District, had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1, 2, 3, 4 and 5, of the Municipal Employment Relations Act by attempting to repudiate the parties' collective bargaining agreement and undermine the Complainants and deprive them of their rights. On December 23, 1996, the Respondent filed a Motion to Dismiss the complaint on the grounds that all of the acts of alleged wrongdoing are pending grievances and that the Union is attempting to bypass the grievance and arbitration procedure in the collective bargaining agreement. On January 29, 1997, the Commission appointed Karen J. Mawhinney to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. The Complainant responded to the Motion to Dismiss on February 19, 1997. The Examiner has considered the arguments of the parties and concludes that the Motion to Dismiss is denied.

No. 28991-A

NOW, THEREFORE, it is

ORDERED

That the Motion to Dismiss is denied.

Dated at Elkhorn, Wisconsin this 24th day of March, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

NICOLET SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS

The Respondent states that all of the acts of alleged wrongdoing listed in the complaint are matters of pending grievances or matters which would be subject to the contractual grievance procedure, and that the Union is attempting to bypass the grievance and arbitration procedure of the collective bargaining agreement. The Respondent submits that the Commission should decline to exercise jurisdiction over this complaint and dismiss it. The Commission has consistently held that it will not exercise jurisdiction over a prohibited practice complaint where the allegations of a breach of a collective bargaining agreement are subject to final and binding arbitration. The Respondent states that there is no impediment to arbitration of the disputes in question and the submission of these disputes to arbitration will resolve the corresponding statutory claims in a manner not repugnant to the Municipal Employment Relations Act. Thus, the Respondent argues that deferral is appropriate and the complaint should be dismissed.

The Complainant asserts that the standard for deferral to the grievance process differs between an action brought under Sec. 111.06 and 111.70, Stats., and the Commission is less likely to opt for deferral under Sec. 111.70 than 111.06. The Complainant states that dismissal and deferral to arbitration are two entirely different matters. Dismissal would mean that the Commission lacks jurisdiction to hear the complaint while deferral would mean that the Commission would retain jurisdiction while an arbitrator decides the merits of the alleged contractual violations. The Complainant asserts that for the Respondent to move for deferral, it must waive all procedural objections to submitting the matter before an arbitrator, and that granting a motion to defer to arbitration would not be appropriate, unless the Respondent specifically waives all technical or procedural defenses to the grievances which are the subject matter of the prohibited practice complaint. Most importantly, the complaint alleges a series of actions and a pattern of conduct that violates Sec. 111.70 rather than a single transgression, and no arbitration will address the pattern of activity engaged in by the employer or whether it violates Sec. 111.70. If the matter is deferred, the Commission should maintain jurisdiction to later resolve the question of whether the pattern of activity by the employer violates MERA.

DISCUSSION:

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss, the complaint must be liberally construed in favor of the complainant and the motion must be denied except where no interpretation of the facts alleged would enable the complaint to relief.

1/ The essence of the Complaint in this matter is that the Respondent is “habitually and

1/ Racine Unified School District, Dec. No. 15915-B (Hornstra, 12/77).

consistently” repudiating the parties’ collective bargaining agreement, or that by its actions and pattern of conduct, the Respondent has attempted to repudiate the collective bargaining agreement and undermine the Complainants. The Complaint states allegations that are separate from the underlying acts that are the subject of grievances.

Thus, dismissal is inappropriate. The issue of whether deferral to arbitration is appropriate is not before me, and it is not clear from the record whether or not the Commission’s criteria for deferral has been met. Those conditions are:

the parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;

the collective bargaining agreement must clearly address itself to the dispute; and

the dispute must not involve important issues of law or policy. 2/

Because the Motion to Dismiss is denied, the Examiner is ready to hold a hearing on the Complaint, unless the parties agree to hold the hearing in abeyance pending the resolution of the grievances that underlie this Complaint.

Dated at Elkhorn, Wisconsin this 24th day of March, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

2/ School District of Cadott Community, Dec. No. 2775-C (WERC, 6/94).