STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE UNIFIED SCHOOL DISTRICT, Complainant

vs.

RACINE EDUCATION ASSOCIATION, Respondent.

Case 149
No. 54796
MP-3261

Decision No. 28992-A

Appearances
Weber & Cafferty, S.C., by **Mr. Robert K. Weber**, 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of Racine Education Association.

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

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine Education Association filed a complaint with the Wisconsin Employment Relations Commission on October 10, 1996, alleging that the Racine Unified School District and its Board of Education had committed prohibited practices in violation of Sec. 111.70(3)(a)1, Stats. On January 22, 1997, the Commission appointed Sharon A. Gallagher, a member of its staff, 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. On January 14, 1997 the Racine Unified School District filed a complaint with the Wisconsin Employment Relations Commission alleging that Racine Education Association had committed prohibited practices in violation of Sec. 111.70(3)(b)3, Stats., (Case 149, No. 54796, MP-3261). On January 29, 1997, the Commission appointed Sharon A. Gallagher to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats., in Case 149. On January 14, 1997, Racine Unified School District filed a motion to consolidate cases 147 and 149 which was unopposed by Complainant and which was granted by the Commission on January 28, 1997. A hearing was scheduled and held on April 15, 1997 in Racine, Wisconsin on the consolidated cases. A stenographic transcript of the proceedings was made and received on June 3, 1997. Thereafter, briefs were submitted, and the record was closed on August 8, 1997, no reply brief having been received from REA. The Examiner, having considered the evidence and the arguments of Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Orders herein.

FINDINGS OF FACT

1. The Racine Unified School District (hereafter District or RUSD) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal office is located at
Employe Relations; and Keri Paulson was the District's Supervisor of Employe Relations and each of these individuals has acted on behalf of the District.

2. The Racine Education Association (hereafter REA) is a labor organization within the meaning of 111.70(1)(h), Stats., and its offices are c/o James J. Ennis, 516 Wisconsin Avenue, Racine, Wisconsin. At all times material herein, REA's Executive Director was James J. Ennis and he has acted on behalf of the Association.

The REA is the duly certified exclusive bargaining representative for all regular full-time and regular part-time certified teaching personnel employed by the Racine Unified School District, but excluding on-call substitute teachers, interns, supervisors, administrators, and directors, as described in the certificate instrument issued by the Wisconsin Employment Relations Board on April 28, 1965 (Dec. No. 7053). The Association and the District have been parties to a series of collective bargaining agreements, the last of which expired on August 24, 1993. The parties have been unable to reach successor agreements since 1993.

James Ennis has at all times material herein been responsible for grievance processing and collective bargaining on behalf of REA with RUSD. In his capacity as Executive Director, Ennis regularly meets with various District officials and Administrators for purposes other than collective bargaining. Frank Johnson has been Director of Employe Relations for RUSD for the past seventeen years. Johnson has normally represented RUSD regarding teacher matters and disputes. Ms. Keri Paulson has been employed by RUSD's Employe Relations Department as Supervisor of Employe Relations at all times material herein. Paulson's immediate supervisor is Johnson. Paulson has normally represented RUSD in matters and disputes regarding non-certified RUSD personnel.

Following three major strikes in the 1970's, REA and RUSD attempted to deal with a large backlog of grievances by setting up regular bi-weekly meetings in the schools where the Principal and the REA Building Representatives could exchange information and express concerns regarding day-to-day events in each school. At this time, building Principals and Union Building Representatives received training from the FMCS in order to perform in these new roles on a local level. No central leadership was involved in this training – neither Ennis nor Johnson or their representatives were involved in the FMCS training. Thereafter, bi-weekly meetings (which occurred on pay days) were set up at certain District schools where the parties were having less trouble talking to and dealing with each other. RUSD has 35 schools and 30 of them have had "payday meetings" in the past. As of September 27, 1996, there had never been a "payday meeting" at Gifford Elementary School.

Sometime in September, 1996 REA Building Representative Sandy Berezowitz requested of Gifford Elementary Principal Richard Fornal that a payday meeting occur at Gifford. Fornal, Principal of Gifford Elementary for approximately three years, agreed and a meeting date was set for September 27, 1996. Approximately one or two days before

September 27th, Fornal called Frank Johnson and asked him to attend the payday meeting at Gifford. Johnson replied that he had a conflict that day and could not attend. Johnson agreed to send Keri Paulson in his place on September 27th. In addition, Fornal also asked Dr. Ann Laing, Director of School Operations for RUSD, to attend the September 27th payday meeting at Gifford. Dr. Laing stated herein that she regularly attends payday meetings at the Elementary School level on behalf of the District and that Fornal asked her to attend the payday meeting at Gifford the day before that meeting was to occur. Dr. Laing also stated that she saw a copy of the agenda for the meeting on or about September 26, 1996. Dr. Laing stated that Ennis has been present at payday meetings which she has attended; and that Ennis was present at two payday meetings which were scheduled and held at Gifford Elementary School after September 27, 1996 but that neither Johnson nor Paulson was present at those meetings.

7. Principal Fornal is not on the RUSD negotiating team and he did not know whether he otherwise has the authority to negotiate on behalf of the District. Fornal wished to have Frank Johnson or his designee present at the September 27th payday meeting because REA Building Representatives had told him (Fornal) that Ennis would be present at that meeting. Fornal also stated herein that as this was to be the first payday meeting at Gifford and he was unsure as to what the procedure should be, he wanted Johnson present to assist him.

8. The topics listed on the agenda for the September 27th payday meeting at Gifford were as follows: "Building discipline concerns; blue slips; student classroom placements; other." The reference to building discipline is to the discipline of students for their behaviors while on school premises. The reference to blue slips concerns the District's use of blue slips which students receive so that they can be returned to their classrooms after they are referred for discipline by a teacher to administration. The reference to student classroom placements involved Principals allegedly reassigning gifted and talented white students out of the classrooms of black teachers and replacing those white students with black students in a disproportionate number.

9. The District has a student discipline procedure, revised March 16, 1992 which reads as follows:

. . .

> a.When teachers refer a student to the office, they must supply necessary background information on a form to assist an administrator in making a decision about the referral. The student will not be returned to the classroom until the administrator communicates with the teacher on the form about the disposition of the referral.
>
> b.A teacher has the right to get school district personnel to escort to the office students referred for disciplinary action.
>
> c.Chronic Student Misbehavior: Before a teacher seeks to have a student excluded from a class because of chronic disruption, the teacher shall at least (1) conduct a conference with the student and (2) contact the student's parents by letter or telephone and discuss the problem.

d.A teacher may use reasonable and appropriate means, including the use of physical restraint, to prevent a threatened or continuing breach of discipline that is endangering the safety of others. Physical restraint will be used only when other means of preventing a breach of discipline or stopping its continuance have been ineffective.

e.Self defense means the use of such force as is necessary to protect oneself. Self defense is permissible when teachers find it necessary to guarantee their safety.

f.When transferring a student from one school to another with the District, the social worker from the sending school shall bring the student AND his/her records to the receiving school and meet with the receiving school's social worker, counselor, and principal.

Since there are no time requirements to place a student into classes upon enrolling, a grace period of 1-2 days should be established to ensure appropriate placement. Information should be gathered during the intake conference. The student should then be sent HOME; the counselor should contact the student when the appropriate schedule has been arranged and the receiving teachers have been contacted.

The above information should be given to ALL administrators, social workers, and counselors.

a.Prospective teachers should be invited to the above mentioned intake conference. If unable to attend, a "please see me regarding a new student" memo from the counselor should serve to notify teachers of violent/aggressive behavior and the purpose of the transfer.

a.A standardized form should be developed which will be used in all schools to notify teachers regarding additions and withdrawals from their classes – within district and within building.

b.A separate disciplinary folder will be kept along with a cumulative folder. This discipline folder should include home reported, blue referrals, suspension letters, etc.

c.Disciplinary record folders will be maintained on a year to year basis, and will be passed along with the cumulative folder from school to school as the student progresses through the district.

d.Principals are responsible for updating the pink notation cards (which must be kept in the cumulative folder) regarding M-Teams, suspension hearings, etc.

l. These records should all be in one place, accessible on a need to know basis.

Cumulative folders must be kept in a designated place and be accessible to all staff.

Disciplinary folders must be kept in the principal's office and be accessible to all staff.

10. The 1992-93 collective bargaining agreement between the parties contains the following grievance procedure relevant hereto:

. . .

91 Grievance Claim

A grievance is a claim which alleges that one or more provisions of this Agreement or established District policy has been incorrectly interpreted and applied. Such claim must be based on an event or condition which affects wages, hours and/or conditions of employment of one or more teachers.

91 Purpose of Grievance Procedure

The purpose of this procedure is to secure equitable solutions to the problems which from time to time arise, affecting the welfare of working conditions of teachers.

91 Processing of Grievances

Grievances of teachers will be considered and processed in the following manner:

91Level One—Principal, Supervisor or Assistant Superintendent

92Informal Discussion

A teacher who believes he/she has cause for a grievance will orally discuss the matter with his/her principal or supervisor with the objective of resolving the matter informally at the lowest possible administrative level. In appropriate cases, the assistant superintendent will be the Level One administrative person to be contacted. If there is a failure to resolve the matter informally, the aggrieved teacher may present his/her grievance in writing to the same person such was discussed with orally, either directly or through the Association's designated representative.

. . .

Section 9.3.1.1 constitutes an informal discussion procedure of disputes which may arise between a bargaining unit member and RUSD. Ennis has attended hundreds of these informal meetings in the past and neither Frank Johnson nor his designee has ever attended such meetings.

11. By letter dated May 21, 1996, RUSD Vice President Deborah Reis wrote Ennis a letter which read in relevant part as follows:

. . .

The Board of Education's Negotiating Committee asked me to reconfirm the fact that the Director of Employee Relations, Frank Johnson, is the District's representative for any teacher labor matters and is the only person that can sign tentative agreements that adjust the terms of the collective bargaining agreement between the Association and the District. In addition, all tentative agreements must be approved by the Board of Education before they are binding. Please note that we want Mr. Johnson to be present at any and all discussions between District personnel and the Association that may lead to side agreements or modifications of the collective bargaining agreement. If Mr. Johnson cannot be present, Keri Paulson will attend in his absence. If neither of these persons are available, the discussion should be postponed.

If you have any questions with respect to the terms of my letter, please feel free to contact me.

. . .

12. By letter dated May 31, 1996 Ennis wrote Board Vice President Reis the following letter:

. . .

Your letter of May 21, 1996 (a copy of which is enclosed for your review) raises crucial questions concerning the relations between the School Board and the Association.

I regularly meet with members of the Board, Assistant Superintendents and Directors of Instruction on a wide variety of issues which result in "side agreements" as you refer to them. When I meet with these people to work out mutual problems – often raised by the District – I assume they are acting with the Superintendent's and Board's authority, and that if a matter may have any impact on the collective bargaining agreement, that they will or have cleared the matter with Mr. Johnson.

I really do not understand what you are saying. You seem to be encouraging the Association not to have contact on any issues of import with anyone but Mr. Johnson and/or Ms. Paulson. If this is really your position, please advise. If not, please clarify.

. . .

13. By letter dated May 28, 1996, Johnson wrote Ennis clarifying his letter of May 21, 1996, as follows:

. . .

Superintendent Armstead indicated that you expressed some concern that the Negotiating Committee's recent letter would prevent you from meeting with the Superintendent and others on matters of mutual interest. Please be assured that it does not. In fact, such involvement is encouraged.

The letter was simply reminding you that I am the Board's designated collective bargaining representative. There is nothing that would prevent you from discussing items of educational interest with administrators as long as such does not specifically include matters intended to become part of the collective bargaining agreement. For example, staff development discussions that may lead to District policy would be permissible without my involvement while staff development discussions for inclusion as contract language would need my involvement.

I am sure you will agree that this is the current law in Wisconsin and in order to avoid future problems similar to those we have experienced in the past, such procedure should be followed.

. . .

1.On September 27, 1996, Ennis arrived early for the payday meeting at Gifford. Ennis asked Paulson why she was there and Paulson responded that she had been asked to attend the meeting by Frank Johnson. Ennis told Paulson that she did not represent teachers and that he would not meet with her. Ennis stated that he canceled the September 27th payday meeting at Gifford in part to avoid the possible construction by the WERC that the meeting was for the purpose of collective bargaining and that he was afraid that he would be "convicted" again of

violating Sec. 111.70, Stats., because he was not present to bargain that day; and because he was not told in advance that Paulson would be present. Ennis stated that he had no intention of engaging in collective bargaining on September 27, 1996 and that he felt that Ms. Paulson's presence changed the tenure of the meeting.

1.On September 27th, Ennis approached Dr. Laing and told her that he would not meet if Paulson was in the room; and that unless Laing removed Ms. Paulson the meeting would not occur. Ennis told Laing that he did not believe that the September 27th meeting was within Paulson's job description; and that the meeting would not be held that day because Paulson was present and because she represented custodians and educational assistants. Ennis told Principal Fornal that he would have met with Frank Johnson but not with Paulson present; and before he left the room Ennis told Fornal that he would file grievances to resolve the concerns on the agenda for September 27th. On September 27th Ennis did not say that he would not meet on September 27th because he was not prepared, that he would not meet that day because he had not been told that Paulson would be there, or that he thought he was being set up by the District.

16. Later on September 27, 1996 Johnson sent the following letter to Ennis regarding Ennis' alleged refusal to meet on September 27th at Gifford:

> On September 26, 1996, Richard Fornal, principal at Gifford School, telephoned and stated that a meeting was scheduled for September 27, 8:00 a.m. with him, principal Bernice Jefferson, and the three REA building representatives. The purpose of the meeting was to discuss the items the REA set out in the attached agenda.
>
> Mr. Fornal stated the meeting was scheduled at the request of REA building representative, Sandy Berezowitz. Mr. Fornal was told you would also be present. Because of this, I thought it best that this office be represented. I could not be there so I designated Keri Paulson to attend in my place since Ms. Paulson is the District's labor relations representative for teachers in my absence.
>
> It has been brought to my attention that when Ms. Paulson appeared this morning, you refused to participate or to allow the meeting to be held as long as she (Paulson) was present. In addition, you said to Ms. Paulson that she is not the District's representative for teachers, but that I was, therefore, you would meet with me but not her. You walked out of the building stating that you would just file grievances instead of trying to work things out.
>
> Jim, it is entirely appropriate that somebody from this office be present whenever principals have been requested by union officials to meet with you on building concerns that may lead to grievances. For you to refuse to meet with school officials because a representative of the Employee Relations office was present is, in my opinion, a violation of Section 111.70 of the Wisconsin Statutes (prohibited practice).
>
> In the future, I am requesting that you notify this office whenever you plan to meet with District administrators so that it can be determined whether or not a representative from this office should be present at the meeting.
>
> . . .

Johnson did not direct any District Administrator to refuse to meet with Ennis if Ennis failed to notify Johnson of the meeting in advance. When Johnson sent Paulson to the September 27th payday meeting at Gifford he had not seen a copy of the agenda and he did not know what the meeting would cover. Rather, he assumed that because Ennis was attending that the September 27th meeting had something to do with labor relations in the District.

1.On one occasion in 1995 Ennis refused to meet with Johnson and Principal Siefert on a student discipline matter because Johnson was there not to bargain but to protect Siefert. In 1995 or 1996, Ennis told Johnson on one occasion that he (Ennis) was refusing to meet alone with Johnson to resolve grievances because of efforts by the Board and Johnson to change the contractual grievance procedure which requires the Board to either settle cases at Step 3, or send them to arbitration.

1.Paulson stated that during grievance committee meetings on May 13 and June 10, 1996, she took notes which reflected that Ennis made comments as follows:

May 13th: I do not want to meet and discuss anything with Mr. Johnson but if you want to write me that's okay. Tired of time bars. Will file grievances every day if necessary.

June 10, 1996: When you refer us to Frank Johnson we will not work with him. Will not go back in procedure.

Ennis made the above comments, but he was thereby objecting to Johnson and the Board's attempt to change the contractual grievance procedure steps.

19. Ennis stated he did not recall refusing to meet with Keri Paulson on any occasions other than September 27, 1996.

20. Johnson had a discussion with Dennis McGoldrick (who did not testify herein) regarding Ennis' reaction to Johnson's September 27th letter. McGoldrick told Johnson that Ennis was very unhappy; and that Ennis had refused to continue payday meetings in any of the schools until Johnson's letter was retracted. Johnson told McGoldrick he would not retract the letter. McGoldrick then stated that he would write a letter to Ennis to try to get Ennis to resume payday meetings. That letter, dated November 8, 1996, read in relevant part as follows:

. . .

This letter is an attempt to clarify any misunderstandings that there may be related to Central Office personnel attendance at meetings between principals and union officials.

The payday meetings which have been established at many of the District's schools have been very beneficial in that they often address minor concerns before they escalate into more serious problems. The agendas are mutually set by building administrators and REA representatives. In most schools, these meetings are conducted without intervention from your office or from Central Office.

On rare occasions, the process stalls and interventions are helpful; these might be requested either by the principal or by the REA representatives. Since Ann Laing and I supervise the building principals, it is most appropriate that either she or I serve as the Central Office representative. It should be fully understood that neither Dr. Laing nor I have authority to make any kind of agreements which would legally bind the District and the Association.

The meetings held at Starbuck Middle School and Horlick High School last spring and this fall were extremely beneficial in developing a collaborative and trusting relationship between the administration and staff; I anticipated that you and I would be able to remove ourselves from the process within a short period of time.

It is my understanding that there are one or two elementary schools which might benefit from similar interventions. And there are several schools where payday meetings have successfully been in progress without interventions. I sincerely hope we can once again schedule such meetings.

21. Since September 27, 1996, payday meetings at various district schools have resumed and Ennis has met with a variety of RUSD managers at various times to discuss mutual problems or concerns. Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The REA did not violate Sec. 111.70(3)(b)3, Stats., when Ennis, REA's agent, refused to meet with Keri Paulson on September 27, 1996 at Gifford Elementary School for a payday meeting since this meeting was intended to be merely a local informational meeting, not a collective bargaining session.

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

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 17th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

Racine Unified School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

RUSD

RUSD argued that Ennis' refusal to meet with Keri Paulson on September 27, 1996 violated Sec. 111.70(3)(b)3, Stats. RUSD noted that Ennis had been notified by letter (May 21, 1996) and orally by Ms. Paulson on September 27th, that Paulson was the District's duly authorized representative (in Johnson's absence); that the September 27th meeting was a collective bargaining meeting, as it concerned, in part, clarification/discussion of the implementation of a grievance settlement regarding the use of blue slips by teachers; and that as a "payday" meeting it constituted a collective bargaining session. The agenda of the September 27th meeting, Ennis' own testimony regarding the purpose of payday meetings in the past as well as the notes from the rescheduled meeting and the fact that Ennis filed grievances over subjects not addressed at the September 27th meeting, all support a conclusion that the September 27th meeting was intended to address questions arising under the parties' collective bargaining agreement. Indeed, RUSD argued, MERA gives it the right to send whomever it wishes to any meeting including meetings having to do with collective bargaining. The fact that Ennis was not notified that Paulson would be in attendance and that he may not have been prepared to meet, should not constitute valid defenses to a Sec. 111.70(3)(b)3, Stats. charge.

RUSD pointed out that in 1974, WERC ordered Ennis to cease and desist from engaging in conduct violative of that same section of the Wisconsin Statutes. Again in 1996, the Commission found that Ennis had violated Sec. 111.70(3)(b)3, Stats., by his refusal to meet with Frank Johnson present at a meeting with Superintendent Armstead. RUSD urged herein that on at least three occasions in 1995 Ennis had refused to meet with Johnson and that twice during 1995 Ennis had refused to meet with Paulson, once objecting to Paulson's speaking during bargaining. RUSD urged that these past acts by Ennis supported its claims in the instant case.

RUSD also noted that prior to September 27, 1996, the issues of blue slip referrals and student discipline had become important due to the parties' failed attempt to settle a grievance on blue slip referrals during the Summer of 1996. Based upon what RUSD characterized as Ennis' "repeated violations of the bargaining law and his contumacious attitude at the hearing . . ." RUSD sought several extraordinary remedies, based upon NLRB case law citations, as follows:

- That Mr. Ennis be ordered to read (or be present when it is read), the appropriate compliance notice at the next scheduled general assembly meeting of the REA;

■. That the WERC seek contempt sanctions against the REA from a circuit court for violation of its orders;

■. That the Association be ordered to pay the District's attorney's fees and costs because of the Association's further violations of the previous WERC orders;

■.For such other further relief as the Commission deems just and equitable.

(Footnotes omitted)

REA

REA argued that it had not violated Sec. 111.70(3)(b)3, Stats., when Ennis canceled the September 27, 1996 payday meeting at Gifford Elementary School. In this regard, REA noted that the September 27th meeting was not intended as a grievance processing meeting or as a contract negotiation session. Rather, in REA's view, the meeting agenda document as well as the testimonial evidence showed that the September 27th meeting was called to discuss and share information regarding an alternative awards system, student discipline procedure and classroom assignment procedures at Gifford. As such, Ennis had the right to cancel the September 27th meeting when the District changed the participants and therefore the nature of the meeting at the last moment without informing Ennis. REA noted that Ennis' conduct was reasonable because the Commission has previously held that he violated MERA when discussions between Ennis and Superintendent Armstead "evolved" into collective bargaining.

REA pointed out that Ennis never intended to bargain with Paulson on September 27th. Nor did Ennis intend to coerce RUSD into changing its designated representatives. Rather, Ennis was aware (by Johnson's May 28th letter) that Johnson was RUSD's representative for teacher collective bargaining, not Paulson, yet he was also concerned that he might draw another prohibited practice due to Paulson's unannounced attendance at the meeting on behalf of Johnson. REA noted that Ennis stated that he was also concerned that he was unprepared for a bargaining session or a grievance meeting with Paulson on September 27th. REA also noted that student discipline had been discussed by RUSD's Dr. Laing and REA on prior occasions; that Gifford Principal Fornal was not authorized to bargain for the District; that no grievances had been filed as of September 27th regarding any matters scheduled to be discussed that day at Gifford.

REA contended that RUSD's evidence of alleged previous refusals to meet and documentary evidence thereon (District Exhibits 6, 8 - 10) was inconsistent, self-serving, unreliable and irrelevant, as the September 27th meeting was not intended to be a collective bargaining meeting. REA argued, however, that the dispositive document of record was the letter from Assistant Superintendent Dennis McGoldrick (sent after REA filed its complaint in Case 147 but before RUSD filed its Answer therein). This letter, REA argued, demonstrated that the September 27th meeting was a payday meeting and therefore was not for the purpose of collective bargaining. In all of the circumstances, REA sought dismissal of the complaint in its entirety.

REPLY BRIEFS

RUSD

In RUSD's view it is irrelevant whether Ennis' actions on September 27th actually restrained or coerced RUSD in its choice of representatives. The September 27th meeting was clearly intended as a meeting to resolve questions arising under a labor agreement with respect to wages, hours and conditions of employment of municipal employes. Ennis' claims that he was unprepared should not constitute a valid defense to a Sec. 111.70(3)(b)3, Stats., charge, where, as here, Ennis stated he was prepared to meet on September 27th if Paulson was not present.

REA's argument that Ennis canceled the September 27th meeting in an effort to avoid another prohibited practice charge disturbed RUSD. RUSD noted that such a claim should not constitute a valid defense herein, citing SHEBOYGAN COUNTY, DEC. NO. 14423-C (WERC, 3/78). RUSD asserted that it had raised Ennis' prior refusals to meet with District representatives to show ". . . Mr. Ennis has a well thought out plan of circumventing the District's bargaining representatives and to show an extraordinary remedy is required" in this case.

RUSD urged that McGoldrick's November 8th letter did not absolve Ennis of a prohibited practice violation for refusing to meet with Paulson on September 27th. In addition, McGoldrick's statements in the November 8th letter that he lacked the authority to legally bind the District at payday meetings should not require a conclusion that payday meetings are not protected by MERA. According to RUSD, the District has the right to decide who will represent it at collective bargaining. In RUSD's view, Ennis attempted to take that right away from the District on September 27th and he should be punished for his conduct.

DISCUSSION

Section 111.70(3)(b)3, Stats., provides that it is a prohibited practice:

> 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 employes in an appropriate collective bargaining unit.

In RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27986-B (WERC, 4/96), the Commission held that Ennis violated MERA when he refused to allow Frank Johnson to participate in a December 17, 1993 meeting with Superintendent Armstead, as that meeting "evolved" into a collective bargaining session. The Association has appealed that decision to the Court of Appeals, which appeal is still pending. In UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, DEC. NOS. 13696-C AND 13876-B (FLEISCHLI 4/78), the Examiner found that the REA had violated MERA by refusing to bargain with Frank Johnson unless the Board of Education also attended the bargaining meetings. Examiner Fleischli held that it was a prohibited practice for either party to refuse to meet with the other party's duly authorized

representative(s) where collective bargaining is to occur, given the fact that the composition of the parties' bargaining teams is a permissive subject of bargaining.

In this case, RUSD has asserted that by refusing to meet with Paulson on September 27, 1996, Ennis again violated Sec. 111.70(3)(b)3, Stats. RUSD urged that because Ennis has shown a stubborn rebelliousness against MERA and has violated MERA in the past, an extraordinary remedy should be meted out against Ennis and REA in this case. In support of this position, RUSD proffered evidence that in 1995, Ennis three times refused to meet with Johnson – twice at meetings with Principal Siefert and once at a meeting with a Benefit Specialist regarding explanation of a Cafeteria plan for teachers; that once or twice in 1995 or 1996 Ennis refused to meet alone with Johnson regarding grievances; and that in 1995 or early 1996, a Board member reported to Johnson that Ennis had refused to meet at bargaining with Paulson and the next day Johnson heard Ennis say that he thought Paulson would not be at mediation that day because a Board member had agreed to exclude her. These examples of Ennis' alleged refusal to comply with the strictures of MERA were offered by RUSD not as separate violations of the law but as background and support for RUSD's requested remedy in this case. In my view, the clear and satisfactory preponderance of the evidence failed to demonstrate that Ennis refused to meet with an RUSD duly authorized representative for purposes of collective bargaining when he refused to attend the September 27, 1996 payday meeting at Gifford Elementary School.

In this regard, I note that Ennis understood that the September 27th meeting was to be merely an informational local meeting, not a collective bargaining meeting; and that Ennis had attended payday meetings in the past which were not considered to be collective bargaining meetings. I note that neither Johnson nor Paulson nor their designees had ever attended any payday meetings prior to September 27, 1996, which would lead a reasonable person to conclude that the September 27th meeting was not intended to be for the purpose of collective bargaining. In addition, I note that Principal Fornal had not called Johnson to request his presence on September 27th because Fornal felt collective bargaining would occur. Rather, Fornal asked both Dr. Laing and Johnson to attend because this was the first payday meeting at Gifford, because a local REA representative had told him Ennis would attend the meeting and because Fornal was unsure the proper procedure to follow at such meetings and who should attend them. 1/

Furthermore, contrary to RUSD's contentions, I do not find that the agenda for the September 27th payday meeting demonstrated that the meeting was clearly for the purpose of collective bargaining. I note that no reference was made on the meeting agenda to discussion of a grievance settlement relating to blue slips. In my view, the evidence of the history of these payday meetings and Assistant Superintendent McGoldrick's November 8, 1996 letter demonstrate that payday meetings at RUSD were never intended to constitute collective bargaining meetings.

As the September 27th payday meeting did not take place, it is unclear what would have been discussed on that date. Hence, I find the notes of the rescheduled Gifford payday meeting, which occurred on October 22, 1996 (without Ennis or Johnson or their designees present) irrelevant to this case. Similarly, the excerpts from the December, 1996 REA

President's Newsletter and the December 6, 1996 memo from Union Representatives Bumpers and Spicer are neither relevant nor do they affect the Examiner's judgment/analysis regarding the intent and purpose of payday meetings. Finally, I note that Ennis had not made arrangements to have his full bargaining committee in attendance at the September 27th payday meeting at Gifford, which also demonstrated that he believed the meeting to be an informational one, not for the purpose of collective bargaining.

The District has contended that Ennis' reaction to Paulson's comment that she had been sent to the September 27th payday meeting by Johnson indicates that in Ennis' mind, the meeting was for the purpose of collective bargaining. I disagree. Ennis' reaction was one of surprise to see Paulson at a payday meeting where no representative of the Office of Employee Relations had ever attended. In addition, in Board Vice President Reis' letter of May 26, 1996, Ennis had been advised in the strongest terms that Johnson was the District's representative for teacher disputes and (implicitly) advised that only if Johnson were present at a meeting would potential side agreements or modifications of the labor agreement be brought to the Board for ratification. 2/ I note that Ennis on May 31, 1996 wrote Board Vice President Reis a letter asking for clarification of Reis' May 26th letter. In his letter, Ennis implied his discomfort with the District's attempt to shift the burden to REA to determine when Mr. Johnson or his designee should be present in a discussion and to require Ennis to foresee when a discussion may lead to a side agreement or modification of the collective bargaining agreement. In my view, the District has the sole responsibility to make these decisions for the District and it can easily do so by requiring all its administrators to advise the District's Central Office before they hold meetings with Ennis or his designees.

Furthermore, Johnson's letter of May 28, 1996 did nothing to "clarify" the position previously taken by Reis. In this regard, I note that Johnson again indicated that Ennis must be capable of foreseeing when a discussion between REA and RUSD representatives will "become part of the collective bargaining agreement" and to assess both REA and RUSD's intent prior to, during and at the conclusion of such discussion. Therefore, it is not surprising that Ennis, who had been found to have violated MERA in a similar situation (Dec. No. 27986-B), would refuse to meet with Paulson on September 27th. As the facts of this case fall short of those involved in UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, SUPRA, and as the meeting of September 27th might have "evolved" into a meeting for the purpose of collective bargaining given Paulson's presence there at, I find no violation of the Statute as alleged by the District. 3/

The District has asked for costs and attorneys' fees in this case. The Commission has held that attorneys' fees are warranted only in exceptional cases where allegations or defenses are frivolous as opposed to debatable. 4/ The evidence in this case fails to show that REA's defenses are so frivolous, in that they are devoid of merit so as to warrant the imposition of costs and attorneys' fees and therefore RUSD's request for costs and fees is hereby denied.

Dated at Oshkosh, Wisconsin this 17th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher

Sharon A. Gallagher, Examiner

ENDNOTES

1/ Fornal admitted herein that he had never been present at collective bargaining for the District and that he did not know whether he had the authority to bargain for RUSD. It is clear that Fornal lacked the authority to bargain collectively for RUSD based upon this record.

2/ The fact that Ennis asserted that Paulson was not authorized to represent the District in matters concerning teachers in my view shows that Ennis was concerned that if Mr. Johnson were not present, although Ms. Paulson could represent RUSD in Johnson's absence, Paulson would not have the full authority to speak on behalf of the District.

3/ The District has asserted that Ennis' alleged refusals on several occasions to meet with Johnson and/or Paulson in 1995 should support an extraordinary remedy in this case. I note that those allegations involve matters that appear to be beyond the Statute of Limitations period applicable to this case. In regard to the District's assertions that Ennis refused to bargain with Johnson on two occasions in May and June, 1996, it is significant that the comments attested to by Paulson were taken completely out of context and were allegedly made by Ennis during collective bargaining, where the Commission has traditionally found a certain latitude should be granted to the parties for exuberance and emotions. RUSD also alleged that Ennis refused to meet with Paulson or allow her to speak in late 1995 or early 1996. It is significant that RUSD did not allege this incident as a separate violation of MERA. Also, I note that Johnson was unclear regarding the date of this incident and he failed to provide any particulars thereof and that this incident also occurred during the heat of bargaining. On this point, I note that bargaining has continued between the parties despite their other difficulties. Finally, as I have found that no violation of MERA has occurred in this case, I find it unnecessary to determine whether a prohibited practice complaint in 1978, approximately 18 years prior to the Commission's (and the Court of Appeals) finding that Ennis violated MERA by refusing to meet with Johnson in December, 1993 shows a pattern of illegal conduct which should be remedied by extraordinary means.

4/ WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90) and cases cited therein.

SAG/rb
28992-A.WRD