

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 154  
No. 55520  
MP-3334

**Decision No. 29206-A**

Appearances:

Kelly & Kobelt, by **Mr. Robert C. Kelly** and **Mr. Brett C. Petranech**, on behalf of the Association.

Melli, Walker, Pease & Ruhly, S.C., by **Mr. Jack D. Walker**, on behalf of the Respondents.

**FINDINGS OF FACT,**  
**CONCLUSION OF LAW AND ORDER**

Amedeo Greco, Hearing Examiner: Complainant Racine Education Association ("Association"), filed a prohibited practice complaint with the Wisconsin Employment Relations Commission ("Commission"), on August 26, 1997, alleging that the Racine Unified School District ("District"), and the Board of Education of the Racine Unified School District ("Board"), had committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act ("MERA") by unlawfully refusing to bargain. The Commission on October 8, 1997, appointed the undersigned to issue and make Findings of Fact, Conclusions of Law, and Order as provided for in Section 111.07(5), Wis. Stats. Hearing was held in Racine, Wisconsin, on November 21, 1997, and the parties thereafter filed briefs and reply briefs that were received by January 26, 1998.

Having considered the arguments and the record, I make and issue the following Findings of Fact, Conclusion of Law and Order.

No. 29206-A

### **FINDINGS OF FACT**

1. The Association, a labor organization under Section 111.70(1)(h), Wis. Stats., has its principal office at 1201 West Boulevard, Racine, Wisconsin, 53405. At all times material hereto, it has been the exclusive collective bargaining representative of 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. James J. Ennis at all times material herein has served as the Association's Executive Director and has acted as its agent.

2. The District, a municipal employer under Section 111.70(1)(j), Wis. Stats., operates a public school system in Racine, Wisconsin, and maintains its principal office at 2220 Northwestern Avenue, Wisconsin, 53404.

3. The individual members of the District's Board serve as agents of the District and they are charged with the possession, care, control, and management of the property and affairs of the District.

4. The District and the Association have entered into a series of collective bargaining agreements setting forth the wages, hours and conditions of employment of bargaining unit employees. The last such comprehensive agreement commenced on August 25, 1992, and ended on August 24, 1993 ("Agreement"). Said Agreement, (Joint Exhibit 1), in Article 25 provided:

#### **ARTICLE 25 JOINT JOB DESCRIPTION COMMITTEE**

##### **25.1 Committee Members**

A joint Job Description Committee consisting of the Assistant Superintendent of Human Resources, who shall serve as chairman, the Assistant Superintendent of Instructional Services, the Superintendent of Schools or his/her representative, and three (3) persons designated by the Association, shall be established. One (1) representative of the Association shall serve as vice-chairman.

##### **25.2 Committee Charge**

The Committee is charged with writing a job description of positions if either the Association, the administrative staff, or the Board requests a definition or redefinition of a position.

### **25.3 Recommendation to Board**

The Committee shall make a recommendation to the Board for its approval.

### **25.4 Requests to Committee/Meeting Time**

Requests for a job description shall be made in writing to the chairman of the Job Description Committee. He/she shall call a meeting within ten (10) school days upon receipt of the request.

5. Article 8 of said Agreement, entitled "Board Rights", stated:

#### **8.1 Board Responsibility and Authority**

The Association recognizes that the Board has responsibility and authority to manage and direct, on behalf of the public, all the operations and activities of the School District to the full extent authorized by law; therefore, it is understood that the Board retains, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and/or the United States, including, but without limiting the generality of the foregoing: the management and control of school properties, school organization, facilities, and instructional programs.

#### **8.2 Limitation of Board Rights**

The exercise of these powers, rights, authority, duties and responsibilities by the Board and the adoption of such rules, regulations and policies as it may deem necessary shall be limited only by the specific and express terms of this Agreement.

6. The parties since at least August 24, 1993, have engaged in negotiations for a successor contract[s] and a contractual hiatus has existed since at least November, 1996.

7. Assistant Superintendent of Human Resources Jetha Pinkston-Lawson ("Pinkston-Lawson"), Chair of the Joint Job Description Committee set forth above, met with co-chair Association Executive Director Ennis and other members of the Joint Job Description Committee on several occasions in 1996 for the purpose of developing a job description for a high school Career Counselor position within the District. Because of budgetary reasons, the District had cut three At-Risk Coordinator positions. The Joint Job Description Committee ultimately agreed upon a job description for the Career Counselor positions which provided for some of the duties previously performed by the At-Risk Coordinators, along with the added compensation to be paid to the Career Counselors (Association Exhibit 1).

8. Pinkston-Lawson and Ennis on November 6, 1996, signed a Memorandum of Understanding for Career Counselor Job Description ("Memorandum"), memorializing the Career Counselor's job description, as well as an agreement to additionally compensate the Career Counselors for the extra work they would be performing. Said Memorandum, (Association Exhibit 1), stated:

...

The Racine Education Association and the Racine Unified School District agreed to redefine the job description for the Career Counselor, formerly known as the Vocational Counselor, as per Section 25 (Joint Job Description Committee) of the Teacher Labor Agreement under the following conditions:

1. The Career Counselor is a member of the counseling department in the school in which s/he is assigned and, as such, has all the same rights under the Teacher's Labor Agreement.
2. As a Career Counselor, s/he will work under the direct supervision of the Assistant Superintendent of Instruction, the Director of Education for Work and Careers and, finally, the Directing Principal.
3. The Career Counselor will have no Act 39 responsibilities.
4. S/he is to have flexible work hours for which compensatory time will be granted. Those hours will be reported to the Director of Education for Work and Careers. When leaving the building, s/he is to notify the switchboard operator and the secretary of the sub-school to which s/he is assigned.

It was further agreed that since each Career Counselor's work day would be increased to 11 periods, each will be compensated an additional one-fifth of his/her salary which is the equivalent of an extra class period. In addition, a half-time (.50) circuit secretary will be shared with the Career Counselors and the Act 39 Coordinator.

This agreement is to be reviewed at the end of the 1996-97 school year.

...

9. The back of said Memorandum contained the following proposed Career Counselor job description:

Qualifications:

Wisconsin certified school counselor

Responsibilities:

1. Counsel students (students reassigned from the sub-school counselor case load).
  - a. Work Experience case load: Maximum 50 seniors (*2.0 periods per day*).
  - b. At-Risk students case load: Maximum 50 juniors (*1.0 period per day*).
2. Coordinate the Work Experience Program (*1.75 periods per day*).
3. Coordinate the use of the Career Center (*2.0 periods per day*).
4. Coordinate the School-to-Work initiatives within the building (*.25 periods per day*).
5. Work with classroom teachers in the implementation of career development activities (*.25 periods per day*).
6. Work with the co-op and capstone teachers to coordinate the selection of student participants and the solicitation of work stations (*.25 periods per day*).
7. Work with employers, community members, Gateway Technical College, and the military in the transition from school to work (*1.0 period per day*).
10. Ennis and Pinkston-Lawson also agreed at that time to present four (4) other job descriptions to the Board for its approval.

11. Ennis in the past has routinely signed other memoranda setting forth the wages, hours, and/or conditions of employment for other bargaining unit members without ever being challenged by the District. After Ennis signed said November 6, 1996, Memorandum, it was never formally ratified or approved by either the Association's general membership or any other Association entity pursuant to a well-developed past practice to that effect.

12. The District's Board met and considered the creation of the proposed Career Counselor positions on November 11, 1996. The Board's official minutes for said meeting, (Association Exhibit 4), state:

Human Resources Matters

"Mr. Haumersen moved, Mr. Kornwolf seconded, to approve five (5) job descriptions: Career Counselor; Coordinator, Evaluation Center; Math Helping Teacher K-5; Subject Coordinator: Mathematics 6-12; Subject Coordinator: Physical Education, Health and Safety at a cost not to exceed \$9,910 per person (3) for the Career Counselor's position. Ayes - 9, Noes - 0.

The Board members at the time of said vote had before them a packet, (Association Exhibit 2), that contained the proposed Career Counselor job description and the November 6, 1996, Memorandum signed by Ennis and Pinkston-Lawson set forth in Findings of Fact 8 and 9, supra, along with a cover sheet to the packet which stated:

BOARD OF EDUCATION

November 11, 1996

HUMAN RESOURCES

AGENDA ITEM: Joint Job Description Committee Recommendations

Presenting: Jetha Pinkston Lawson, Assistant Superintendent, Human Resources

Description: As per Section 25 of the Teacher's Labor Agreement, the Joint Job Description Committee is submitting for your approval the attached job descriptions for the positions of:

Career Counselor

Coordinator, Evaluation Center  
Math Helping Teacher K-5  
Subject Coordinator: Mathematics 6-12  
Subject Coordinator: Physical Education, Health and Safety

Recommendation: To approve, as Board of Education policy, the five (5) job descriptions as submitted at a cost not to exceed \$9,910 per person (3) for the Career Counselor's position.

Action Taken:

The typed, taped transcriptions of said meeting, (District Exhibits 14 and 15), show that the Board members at that time specifically discussed that the three Career Counselors would receive added compensation of "\$9,910 per person." There is no express mention in said taped transcription about the November 6, 1996, Memorandum.

13. The District on November 12, 1996, appointed three teachers, including Vocational Counselor Jay Newell, to be Career Counselors. They between November 12, 1996, to November 26, 1996, performed the duties called for in the Career Counselor job descriptions at the higher rate of pay approved by the Board on November 11, 1996. Ennis personally contacted Pinkston-Lawson on November 12, 1996, to make sure that the Career Counselors would be paid at the higher rate of pay, and they were.

14. Following said ratification, Board member Harry J. Garnette concluded that the Board had made a "big mistake" in approving said Memorandum because he believed it could hurt morale in the high schools and because, contrary to the District's past policy, it provided for the wages to be paid to the Career Counselors. The Board in the past had only adopted job descriptions which did not provide for their rates of pay and November 11, 1996, marked the first time that the Board adopted a job description that was accompanied by a rate of pay. Garnette believed that he had only voted for the job description on November 11, 1996, and he informed Ennis and Pinkston-Lawson about a week after the November 11, 1996, vote that he would be moving to reconsider the Board's action at its next scheduled meeting. Board President Linda C. Flashinski also concluded that the Board had erred in adopting a job description that contained the wages to be paid for said position. She testified that the Board had made a mistake in doing so; that "the agreement part of the language [i.e. the November 6, 1996, Memorandum] was not in that motion"; and that the Board on November 11, 1996, only approved the joint job description. Some social worker counselors complained to Flashinski after November 11, 1996, that it was unfair to give Career Counselors added compensation when they themselves had a much heavier workload.

15. The Board at a special November 26, 1996, meeting voted to reconsider and by a 6-0 vote it rescinded its earlier November 11, 1996, action dealing with the Career Counselors. The Board's official minutes of that meeting state: "Mr. Garnette moved, Mr. Haumersen seconded, to disapprove the Career Counselor Job Description and the memo of understanding between Jim Ennis and Jetha Pinkston-Lawson dated November 6, 1996." The typed, taped transcription of said meeting, (District Exhibit 17), shows that Garnette at that time said: "Madam Chair, the second motion would be to . . .to ah . . .ah . . .I would . . .that I would move to disapprove the Career Counselor job description and the memo of understanding between uh . . .Jim Ennis and Jetha Pinkston-Lawson dated November 6, 1996." The Board at that time referred the matter back to committee and asked for the Association's input. Said action by the Board was undertaken unilaterally and without the consent of the Association which has never subsequently asked to bargain over said matter.

16. The three former Career Counselors were immediately stripped of the new duties they had assumed as Career Counselors and they no longer received the higher rate of pay they were paid when they served in said former capacity. Former District Superintendent Major Armstead told Ennis on November 26, 1996, that the former Career Counselors would revert back to their original job responsibilities and they did so. The other four (4) job descriptions adopted by the Board on November 11, 1996, were left undisturbed by the Board's November 26, 1996, action and they have been filled from that date to the present.

17. The Association on January 28, 1997, filed a grievance (District Exhibit 2), over the District Board's November 26, 1996, action. The Association first requested that said grievance be arbitrated, but it eventually withdrew its grievance on September 19, 1997 (District Exhibit 4).

Upon the basis of the foregoing Findings of Fact, I issue the following

#### **CONCLUSION OF LAW**

Respondents Racine Unified School District and the Board of Education of the Racine Unified School District and its agents did not unlawfully refuse to bargain with the Racine Education Association regarding the Career Counselor positions, and they thus did not violate Sections 111.70(3)(a)1 and/or 5 of the Municipal Employment Relations Act.

Upon the basis of the above Findings of Fact and Conclusion of Law, I make and issue the following



**ORDER**

IT IS ORDERED that the complaint allegations hereby be, and they hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin, this 6th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/  
Amedeo Greco, Examiner

**RACINE UNIFIED SCHOOL DISTRICT**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER**

**POSITIONS OF THE PARTIES**

The Association asserts that by approving the November 6, 1996, Memorandum signed by Ennis and Pinkston-Lawson, the District "entered into a valid collective bargaining agreement with the Association on November 11, 1996. . ."; that the District's "subsequent rescission of that agreement violated. . ." Section 111.70(3)(a)5 of MERA; that it is irrelevant as to whether Pinkston-Lawson was authorized by the Board to sign said Memorandum inasmuch as the Board itself ratified it on November 11, 1996; and that the District has "no standing" to question whether the Association's membership ratified said Memorandum pursuant to its own internal rules. The Association also argues that the District's affirmative defenses are without merit because: (1), it has the right to file the instant complaint even if its initial grievance was untimely; and (2), neither *res judicata* nor collateral estoppel deprive the Commission of jurisdiction over this matter. The Association requests as a remedy that said Memorandum be reinstated and that all affected employes be made whole.

The District, in turn, asserts that it did not violate Section 111.70(3)(a)5 Stats., because "no collective bargaining agreement existed which could have been breached". It contends that: (1), the Career Counselor's job description represents Board policy and thus "does not constitute a collective bargaining agreement between the parties"; (2), the Board never approved the November 6, 1996 Memorandum, but instead, "only approved the job description"; (3), Pinkston-Lawson had no authority to enter into any collective bargaining agreement with the Association; (4), no such collective bargaining agreement "exists because the Association never ratified any agreement"; and (5), even "if a contract existed the Board terminated it." The District also claims that the instant complaint "is barred because there was an *ad hoc* agreement to arbitrate the grievance"; that job descriptions are "permissive subjects of bargaining and the District may change them unilaterally during a contract hiatus"; and that the "Career Counselors are not performing extra work and therefore are not entitled to any extra pay."

**DISCUSSION**

This case mainly centers on whether the District's Board on November 11, 1996, formally approved the November 6, 1996, Memorandum signed by Ennis and Pinkston-Lawson. 1/

It is true that the Board members on November 11, 1996, had before them said Memorandum, thereby indicating that they should have known about it at that time and that they were expected to address its contents. However, and as related in Finding of Fact No. 12, *supra*, the actual motion passed by the Board that day did not refer to said Memorandum.

Instead, the motion on its face only referred to five (5) proposed job descriptions. In addition, and as set forth in Finding of Fact No. 12, supra, the typed, taped transcriptions of said meeting, (District Exhibits 14 and 15), show that the Memorandum was never specifically mentioned at any time during the Board meeting, thereby showing that the Board on November 11, 1996, only approved the Career Counselor job description and not the Memorandum itself.

However, and as set forth in Finding of Fact No. 15, supra, the District's Board on November 26, 1996, passed a resolution which disapproved "the Career Counselor job description and the memo of understanding between Jim Ennis and Jetha Pinkston-Lawson dated November 6, 1996." The typed, taped transcription of said meeting, (Exhibit 17), also reveals that Board member Garnette at that time explained that his motion was aimed at disapproving "the Career Counselor's job description and the memo of understanding between Jim Ennis and Jetha Pinkston-Lawson dated November 6, 1996." The Board's November 26, 1996, action therefore indicates that the Board members at that time may have believed that they on November 11, 1996, had ratified the November 6, 1996, Memorandum, which was why they believed it was necessary to disapprove it.

On the other hand, Board members Garnette and Flashinski testified here that they did not intend to approve the Memorandum on November 11, 1996, and that the Board, in fact, did not do so because the motion they passed on November 11, 1996, only referred to the job descriptions, without any mention whatsoever of the Memorandum. I credit their testimony because they testified in such a straightforward manner and because the record shows that: (1), the cover page of the November 11, 1996, packet before them set forth in Finding of Fact 12, supra, only referred to job descriptions and not to the November 6, 1996, Memorandum; (2), the motion they passed only referred to said job descriptions and not to the November 6, 1996, Memorandum; and (3), the typed, taped transcriptions of the November 11, 1996, meeting show that the November 6, 1996, Memorandum was never mentioned. Given all this, I find that the Board members on November 6, 1996, in fact never approved said Memorandum and that, as a result, no binding collective bargaining agreement was reached between the Board and District on the one hand and the Association on the other hand.

The Association asserts otherwise by pointing out that Garnette testified that the Board on November 11, 1996, had approved "something more than . . ." a job description. The "something more" however, was not the Memorandum. It was the job description and the additional salary to be paid for that position. Since the Board never before had adopted a job description which provided for wages, and since the inclusion of such a wage component was contrary to Board policy, the Board on November 26, 1996, was entitled to rescind its earlier November 11, 1996, action which provided for a wage increase and to then remand a clean job description back to committee for further consideration.

The District, after all, still retained the right under MERA to "manage and direct" all the operations and activities of the District "to the full extent authorized by law", including the management and control of "instructional programs" since this quoted language was contained in Article 8.1 of the expired 1992-1993 contract referenced in Finding of Fact No. 5, *supra*, and since it is the language that became part of the *status quo* during the parties' contractual hiatus.

The District during the contractual hiatus therefore retained the same rights that it formerly had under Article 8.1 of the expired contract, one of which is the right to determine whether to create and fill new teaching positions, along with the concomitant right to decide whether to either abolish positions and/or to declare that the duties of any such positions and instructional programs be terminated. That is all that the Board did here on November 26, 1996, when it rescinded its earlier November 11, 1996, action and when it then determined that it no longer wanted Career Counselors to perform the added duties they had been performing between November 11, 1996, to November 26, 1996, under the Career Counselor job description which was adopted contrary to Board policy. The Board could lawfully take that action on November 26, 1996, because there was nothing in the expired 1992-1993 contract and the ensuing contractual hiatus which prohibited the District and/or the Board from declaring that it no longer wanted employees to perform the added job duties spelled out in the Career Counselor's job description.

The Association asserts that the Board's November 26, 1996, action was unlawful because the Career Counselor positions - once agreed to under the November 6, 1996, Memorandum and subsequently adopted by the Board on November 11, 1996 - could not be terminated during the 1996-1997 school year because said Memorandum stated: "This Agreement is to be reviewed at the end of the 1996-1997 school year." The problem with this claim is that the Board, in fact, did not adopt the Memorandum at its November 11, 1996, meeting for the reasons stated above. That being so, the Board was not required to fill the Career Counselor positions for the remainder of the 1996-1997 school year, as it retained its managerial discretion - absent any express agreement to the contrary - to assign work and to exercise control over its "instructional programs".

Lastly, the three former Career Counselors were immediately told after the Board's November 26, 1996, actions that they no longer had to perform the added duties spelled out in the Career Counselor's job description. Given this clear command, it is immaterial that former Career Counselors such as Newell continued to perform extra duties and to put in additional time, as they did so voluntarily after they were expressly told that they would not receive any additional compensation. Newell and others therefore only did what almost all good teachers routinely do on a daily basis: they put in extra work and extra time even though they are not compensated for their added effort.

For the reasons stated above, I therefore conclude that the complaint is without merit and that it therefore should be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 6th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/  
Amedeo Greco, Examiner

**ENDNOTES**

1/ Given the ultimate disposition herein, it is unnecessary to determine whether, as the District argues, this case is barred because the Association initially sought to arbitrate the Board's November 26, 1996, action and whether Ennis alone had the authority to bind the Association when he signed the November 6, 1996, Memorandum.