STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATIONAL ASSISTANTS ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRCT, and KERI A. PAULSON, EMPLOYEE RELATIONS SUPERVISOR FOR THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 165
No. 55679
MP-3357

Decision No. 29233-A

and

Case 166
No. 55680
MP-3358

Decision No. 29234-A

Appearances:

Kelly & Kobelt, Attorneys at Law, by **Kurt Kobelt**, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by **Douglas Witte**, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine Educational Assistants Association filed two complaints with the Wisconsin Employment Relations Commission on October 17, 1997, alleging that Racine Unified School District, the Board of Education of the Racine Unified School District, and Keri A. Paulson, Employee Relations Supervisor, had committed prohibited practices in violation of MERA. One complainant was denominated Unit 1 and covered the certified assistants and the other complainant was denominated Unit 2 and covered the non-certified assistants. The complaints made identical allegations against the District, one on behalf of Unit I and the other on behalf of Unit II. Subsequent to the filing of the complaints, the Commission issued a unit clarification decision which merged Units I and II. Thus, by order of the Commission, those two bargaining units have been combined into one bargaining unit. See, RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 10095-E (WERC, 10/97). For purposes of this proceeding, no distinctions will be drawn between these Units.

On November 5, 1997, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On January 8, 1998, the District filed an answer to each complaint, which included a motion to strike Paulson's name from the caption of each complaint and a motion to dismiss Paulson from each complaint. On January 20, 1998, the Association amended their complaints to include more specific allegations against Paulson. Hearing on the complaints was held on April 2, 1998 in Racine, Wisconsin. At the start of the hearing, the Examiner denied the District's motions. The parties then presented their evidence. Afterwards, both parties filed briefs and reply briefs, whereupon the record was closed on June 10, 1998. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Racine Educational Assistants Association, hereinafter referred to as the Association, is a labor organization having its principal office at 1201 West Boulevard, Racine, Wisconsin 53405. At all times material herein, James Ennis has been the Association's Executive Director and has acted on behalf of the Association.

2. The Racine Unified School District, hereinafter referred to as the District, is a municipal employer with its principal office located at 2220 Northwestern Avenue, Racine, Wisconsin 53404. The Board of Education of the Racine Unified School District is charged

with the possession, care, control and management of the property and the affairs of the District. Keri A. Paulson is the District's Employee Relations Supervisor, and has acted on behalf of the District. She has been designated as the District's representative for the purposes of collective bargaining with the Association. She has the authority to negotiate on behalf of the District.

3. The Association and the District have been parties to a series of collective bargaining agreements covering the District's Educational Assistants. In 1994, the parties divided the then-existing unit into two bargaining units known as Unit I and Unit II. Unit I consisted of certified assistants and Unit II consisted of non-certified assistants. The parties' last agreement was reached in May of 1996. That agreement commenced on August 26, 1993 and expired on June 30, 1995.

4. By letter dated March 4, 1997, the Association notified the District of its desire to negotiate successor agreements for Units I and II. The Association renewed this request on behalf of Units I and II in writing on September 22, 1997.

5. Sometime in September, 1997, Ennis and Paulson discussed dates to begin bargaining. They agreed that the parties' initial meeting would be October 2, 1997. This meeting was not intended to be a full-scale bargaining session.

6. Sometime prior to October 2, 1997, Paulson and Association Attorney Kurt Kobelt had a discussion on the phone concerning the upcoming negotiations. In this conversation, Paulson told Kobelt that historically the Association presented its proposal first and then the District presented its proposal at a later meeting. Paulson characterized this as the parties' past practice and proposed this same procedure for this round of negotiations. Kobelt indicated he was unaware of what the parties had historically done, but that he would confer with Ennis regarding same. Several days later, Kobelt phoned Paulson about the upcoming negotiations. In this conversation, Kobelt told Paulson that the Association disagreed that there was a past practice whereby the Association presented its proposal first in negotiations and then the District presented its proposal at a later date, but that the Association nonetheless was prepared to proceed in this manner on October 2. As a result of these two phone conversations, the Association knew it was presenting its bargaining proposal on October 2, and that the District would be presenting its bargaining proposal at a later date.

7. On September 23, 1997, Ennis wrote the District a letter wherein he requested the release of certain educational assistants from school on October 2, 1997 to "attend the presentation of the Association's contract proposal. . ." On September 26, 1997, the District notified the Racine news media that it would receive the "Association Unit I and Unit II proposals for successor labor agreements" at a meeting scheduled for October 2, 1997.

8. On October 2, 1997, the parties met for the presentation of the Association's bargaining proposal. Ennis was the Association's representative at this meeting and Paulson was the District's representative. This meeting was conducted in open session. No members of the media or public attended this meeting. Thus, only bargaining committee members were present. During the meeting, the Association presented its proposal and Paulson asked a number of questions concerning same. After the Association had presented its proposal, Paulson told the Association's bargaining committee that the District would get back to them when it had decided what it wanted to do in response to the Association's proposals. Paulson also told them that she needed to go back to the Board of Education to receive her authority. The District did not present its bargaining proposal to the Association at this meeting.

9. The next day, Kobelt sent Paulson a letter proposing various bargaining dates. On October 7, 1997, Paulson responded to Kobelt with the following letter:

> Dear Mr. Kobelt:
>
> RE: REAA Units 1 and II Negotiations
>
> This is to confirm that I am in receipt of your correspondence dated October 3, 1997 which proposes various bargaining dates.
>
> As you may recall, I stated at our meeting on October 2, 1997 that I needed to study, cost, and discuss your proposal and receive my authority from the Board of Education's Negotiating Committee. I expect to complete that task no later than Tuesday, October 21, 1997. Therefore, I propose that the District present its offer to the Racine Educational Assistants' Association Units #1 and #2 on Wednesday, October 22, 1997 at 4:00 p.m. As you know, this part of the initial exchange must be publicly noticed.
>
> Following that presentation, I would suggest that the parties bring their calendars and set a date to begin negotiations in closed session.
>
> If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Keri A. Paulson /s/
Keri A. Paulson
Employee Relations Supervisor

/p.m.

cc: Frank Johnson
Jim Ennis

10. Several days later, the Association notified the District that the date of October 22 was acceptable. On October 20, 1997, the District notified the Racine news media that it would make its "proposals for successor labor agreements" to the Association at a meeting on October 22, 1997.

11. On October 22, 1997, the parties met for the presentation of the District's bargaining proposal. Like the October 2, 1997 meeting, no members of the media or public attended this meeting. Thus, only bargaining committee members were present. During the meeting, Paulson presented the District's proposal and answered questions concerning same.

12. The parties had their first full-scale bargaining session on November 20, 1997. On December 1, 1997, the Association filed a request for mediation with the Wisconsin Employment Relations Commission.

13. Over the years, the District has consistently maintained the position that the Association present its bargaining proposal first. Additionally, the record indicates this has happened since 1980. Thus, since then, the Association has always presented its proposal first and then the District has presented its proposal at a later meeting. In 1989, the Association still presented their proposal first, but the District presented their proposal that same evening instead of doing so at a later date. The Association did not like this manner of exchanging proposals (i.e. always having to present its proposal first), and put the District on notice of its displeasure with same by frequently complaining about it in negotiations. However, insofar as the record shows, the Association never made a formal proposal for the simultaneous exchange of proposals or some other arrangement. Also, insofar as the record shows, the District never refused to bargain over the format for the exchange of proposals.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Section 111.70(4)(cm)2 Stats., does not require a simultaneous exchange of initial bargaining proposals. The District therefore did not violate that section by failing to simultaneously exchange initial bargaining proposals with the Association on October 2, 1997.

2. By its actions herein, the District did not engage in bad faith bargaining, and therefore did not violate Sec. 111.70(3)(a)4 or 1, Stats.

3. To the extent that Paulson took actions in this case, it was in her capacity as an employe of the District and not in her individual capacity. Paulson therefore did not violate Sec. 111.70(3)(c), Stats.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint of prohibited practices is dismissed.

Dated at Madison, Wisconsin this 7th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Association filed two complaints which make identical allegations against the District; one on behalf of Unit I (the certified assistants) and the other on behalf of Unit II (the non-certified assistants). The complaints set forth three basic allegations. The first is that the District engaged in bad faith bargaining in violation of Sec. 111.70(3)(a)4, Stats., by insisting on two separate meetings to present initial bargaining proposals. The second allegation is that this same conduct (i.e. the District's insistence on two separate meetings to present initial proposals) also violated Sec. 111.70(4)(cm)(2), Stats. The third allegation is that another form of bad faith bargaining occurred when the District sent Paulson to the bargaining table on October 2, 1997, without vesting her with any authority to bargain. The District denies it committed any prohibited practices by its conduct herein.

POSITIONS OF THE PARTIES

Association

The Association argues that the District's actions constituted prohibited practices. It makes the following arguments to support this contention.

First, it contends that the District engaged in bad faith bargaining when it conditioned the presentation of its proposal on its receipt of the Association's proposal. For background purposes, it notes that over the years the Association has tried to exchange its initial bargaining proposal simultaneously with the District, but that the District has refused to do so. According to the Association, it has consistently complained about going first, but ultimately had no choice but to do so because otherwise there would not have been any bargaining. The Association avers that the legal issue presented here should be examined without regard to the parties' history because that history (i.e. the Association always going first) was unilaterally imposed by the District and lacked mutual consent. The Association argues that the District's contention that the Association waived its claims cannot be squared with the record. It asserts that accepting the District's waiver argument would be tantamount to faulting the Association for meeting its legal responsibility to represent its members notwithstanding its legal dispute with the District.

To support its contention that the District's conduct constituted bad faith bargaining, the Association relies on various decisions issued by the National Labor Relations Board. Broadly speaking, those decisions hold that placing onerous and unreasonable conditions on the manner in which bargaining is conducted is bad faith bargaining. In the Association's view, this case presents an even more aggravated example of an unduly onerous condition because it provides the District with the upper hand at the bargaining table. According to the Association, the advantages of the District reviewing the Association's proposals before presenting its proposal are manifest. Citing what it calls the most obvious example, the Association asserts that knowing the components and cost of the other side's economic package is useful in determining the parameters in which to devise one's own economic proposals. The Association believes that since the District got the Association's proposal first, it was provided with a tactical advantage which enhanced its bargaining leverage.

Second, the Association argues that the District's failure to simultaneously exchange proposals on October 2 undermines the right of meaningful public participation that is contemplated in Sec. 111.70(4)(cm)2, Stats., and therefore violates same. According to the Association, that section envisions a simultaneous exchange of proposals. It contends that if the Legislature intended unions to always go first, it would have said so in clear language. It also asserts that the use of the term "meetings" in the plural (in that section) does not mean that the union must present its proposal first. To support this premise, it notes that Sec. 111.70(4)(cm)2, Stats. provides that initial proposals are to be discussed in a setting that is "open to the public". As the Association sees it, this can only happen when the public and the media are made aware of the initial proposals of both parties at the same time. The Association submits that "any citizen or member of the media who appeared at the October 2 session would have been presented with a one-sided picture of the REAA making demands for more money and improved language." The Association also submits that the "damage done by this distorted picture of the negotiations...would not be undone by the fact that a similar public notice was provided for the presentation of the District's proposal" because it is unlikely that a citizen who attended the first session would attend the second session. With regard to the NICOLET HIGH SCHOOL decision cited by the District, the Association avers there is a factual distinction between that case and this one, namely that in NICOLET there was no bargaining that took place while the issue was being litigated before the Commission, whereas here bargaining occurred. Additionally, the Association characterizes the Examiner's reasoning in that case as "circular and naive".

Finally, the Association contends that another form of bad faith bargaining occurred when the District sent Paulson to the table on October 2 without vesting her with any authority to bargain on that day. To support this premise, it cites Ennis' testimony that Paulson said at the October 2 bargaining session that she could not respond to any of the Association's proposals or make any proposals for the District because she had no authority to do so. The Association submits that

Ennis' reasonable perception that Paulson meant what she said on October 2 is corroborated by what she wrote in her October 7 letter (i.e. that she had yet to "receive my authority from the Board of Education's Negotiating Committee.") The Association asserts that since Paulson lacked the authority to bargain on October 2, this meant that no one at the bargaining table on that date for the District had the authority to negotiate on behalf of the District. The Association believes this constituted bad faith bargaining. The Association also argues that Paulson should be individually liable under Sec. 111.70(3)(c).

As a remedy for these alleged prohibited practices, the Association asks that the District be ordered to cease and desist from violating MERA and post the appropriate notices. With regard to the District's assertion that it is entitled to attorneys fees because this case is frivolous, the Association contends this assertion "itself borders on the frivolous."

District

The District argues that its actions did not constitute prohibited practices. In its view, these two complaints have no basis in fact or law, but rather are simply an attempt to frustrate the bargaining process by attacking the District's chosen bargaining representative and the lawful bargaining strategy chosen by the District. It makes the following arguments to support this contention.

First, with regard to the Association claim that the District's failure to simultaneously exchange proposals at an open meeting violated Sec. 111.70(4)(cm)2, the District avers that MERA does not require simultaneous exchange of initial proposals. It asserts that the Association's position (i.e. that the parties are required to simultaneously exchange initial bargaining proposals) is untenable given: 1) the language of the statute, 2) the legislative history, and 3) prior Commission case law. With regard to the first point (i.e. the language of the statute), the District contends that the plain language of the statute contemplates more than one meeting by the use of the plural form (i.e. "meetings"). The District submits the use of the plural was a recognition by the legislature of the fact that in many instances one party will present its proposal first (generally the union) and the other party (generally the employer) will respond at a later date. With regard to the second and third points previously referenced (i.e. the legislative history and Commission case law), the District asserts that the legislative history supports its position that more than one meeting is contemplated under that section. It cites the Commission case of NICOLET HIGH SCHOOL to support this interpretation. DEC. NO. 17136-A (Houlihan, 12/80), AFF'D BY OPERATION OF LAW, DEC. NO. 17136-B (WERC, 12/80). Given the foregoing, the District argues that the Association is wrong that the statute requires a simultaneous exchange.

Second, the District contends that the Association waived its right to object to the method of exchange of proposals in 1997. To support this premise, it notes that the uncontroverted evidence shows that for almost 20 years the Association has always presented its proposal first and that the District responded, usually a few weeks later, with its proposal. Thus, the practice in the District has always been to have the Union go first and the District respond later. As the District sees it, the Association simply resigned itself to the fact that this is how initial proposals have been exchanged. The District contends that if the Association does not like this way of exchanging initial proposals, it is free to propose a different method. The District notes that to date though, the Association has not proposed a different method. With regard to Ennis' belief that it would be better to have simultaneous proposals because he believes the Association is disadvantaged when it has to go first, the District contends his belief is irrelevant.

Third, with regard to the Association's claim that Paulson lacked authority at the October 2 meeting, the District contends that the record evidence shows that the Association was aware the District was not going to present a proposal on October 2 and agreed to meet knowing that only the Association's proposal would be presented. The District asserts that when Paulson said she had no authority to present a proposal, that should neither have come as a surprise to the Association, nor does it constitute grounds for a prohibited practice. The District asserts that Paulson clearly was the District's designated bargaining representative and had more than enough authority for the October 2 meeting (which is the only date referenced in the complaints). According to the District, the fact that she was not willing to make a proposal on October 2, after not having prepared one, does not lessen her authority. The District believes the Association was unhappy that Paulson refused to present the District's proposal on October 2, and is seeking to use the prohibited practice mechanism as a means of attempting to punish her for her actions. The District argues this is an abuse of the Commission's procedures. With regard to the contention that Paulson should be individually liable under Sec. 111.70(3)(c), the District submits that to the extent Paulson took actions in this case, it was in her capacity as an employe of the District and she was at all times acting within the scope of her authority. It asserts no evidence was presented that Paulson was acting in her individual capacity.

The District believes the Association's complaints are so devoid of merit they should be considered frivolous, and the District should be awarded its costs and attorneys fees for defending itself in this matter.

DISCUSSION

The following is an overview of the way this discussion is structured. The alleged violation of Sec. 111.70(4)(cm)2 will be addressed first. Next, the focus will turn to the two

bad faith bargaining allegations. Next, the alleged violation of Sec. 111.70(3)(c) will be addressed. Finally, the District's request for attorneys fees will be addressed.

Alleged Violation of Sec. 111.70(4)(cm)2

Section 111.70(4)(cm)2 provides as follows:

> 'Presentation of initial proposals; open meetings.' The meetings between parties to a collective bargaining agreement or proposed collective bargaining agreement under this subchapter which are held for the purpose of presenting initial bargaining proposals, along with supporting rationale, shall be open to the public. Each party shall submit its initial bargaining proposals to the other party in writing. Failure to comply with this subdivision is not cause to invalidate a collective bargaining agreement under this subchapter.

The Association claims that the District's failure to simultaneously exchange initial bargaining proposals with the Association on October 2, 1997 violated this section.

This claim does not raise an issue of first impression. This same claim was previously raised and decided in NICOLET HIGH SCHOOL, DEC. NO. 17136-A (Houlihan, 12/80), AFF'D BY OPERATION OF LAW, DEC. NO. 17136-B (WERC, 12/80). In that case, Examiner Houlihan decided as a matter of law:

> 1) That Section 111.70(4)(cm)2 Wis. Stats. does not require a simultaneous exchange of initial bargaining proposals.
>
> 2) That the Employer did not violate Section 111.70(3)(a)1 or 4, Wis. Stats. by refusing to agree to a simultaneous exchange of initial bargaining proposals.
>
> Id, slip. op. at p. 2.

In his discussion, the Examiner first reviewed the language itself. The pertinent portion of that discussion is as follows:

> An examination of the statutory language in question lends no support to the Union's position. The substantive heart of the "open meetings" provision of the Municipal Employment Relations Act is the single sentence contained in Section 111.70(4)(cm)2, Wis. Stats., which provides as follows;

> The meetings between parties to a collective bargaining agreement or proposed collective bargaining agreement under this subchpater which are held for the purpose of presenting initial bargaining proposals, along with supporting rationale, shall be open to the public.

On its face, this sentence does not appear to direct the parties to simultaneously exchange their initial proposed modifications. The sentence does refer to meetings in the plural, suggesting that the legislature contemplated the possibility that the parties might use more than a single meeting to present and explain their proposals. The format for such meetings is something the statute is silent on so long as they are conducted in public.

The Examiner then went on to provide a detailed analysis of the legislative history of Sec. 111.70(4)(cm)2. In particular, he noted that in 1977 when MERA was enacted, a number of amendments were offered which would have required both parties to present their proposals at a single meeting. Those changes were rejected. Id., slip op. at 5. In addition, amendments were offered which would have required the second meeting to be held within a certain time frame after the first meeting. Those amendments were also rejected. Id., slip op. at 6. After reviewing this legislative history, he opined:

> the legislature considered, and rejected, a series of amendments which would have controlled the format of the exchange of initial proposals. Substitute Amendment 5, in particular, would seemingly have brought about the result the Union urges in this matter. The fact that the Legislature specifically rejected not only this specific format, but others as well, in favor of language which does not, on its face, address the format for exchange of initial bargaining proposals lends strong support to the Respondent Employer's contention that the provision serves only to require a public exchange and explanation of those initial proposals and leaves to the parties negotiation the format for that exchange.

Id, slip. op. at p. 6.

After reviewing both the statute's wording and its legislative history, the Examiner concluded that Sec. 111.70(4)(cm)2 did not require a simultaneous exchange of initial bargaining proposals.

Although this decision was reached in 1980, the statutory language in question has not changed since then. Additionally, this decision has never been reversed. That being so, NICOLET is still good case law.

The Association argues that NICOLET notwithstanding, the District's failure to simultaneously exchange proposals with the Association on October 2 undermines the right of meaningful public participation that is contemplated by Sec. 111.70(4)(cm)2. The Examiner does not find this argument persuasive for the following reasons. To begin with, the public has no rights under MERA. MERA protects the rights of employers and employes. That said, Section 111.70(4)(cm)2 was apparently designed so that the public could have input into the initial bargaining process if it so desired. However, that section goes on to provide:

> Failure to comply with this subdivision is not cause to invalidate a collective bargaining agreement under this subchapter.

Nor is there any other violation of MERA if the parties fail to comply with that section. Second, assuming the public has some right to participate, there is no evidence in the statute or WERC case law that either the Association or the District is entitled to act as some sort of third party attorney general to enforce such rights. Additionally, there is no evidence in this case that any taxpayer or member of the public in Racine wishes the Association to act on its behalf to attempt to enforce its rights. Third, the Association's claim that it is unlikely that citizens who took the time to attend the October 2 meeting would attend a second meeting is conjecture. In this case, no member of the public attended either session.

Given the foregoing, it is held that the District's failure to simultaneously exchange initial bargaining proposals with the Association on October 2, 1997, did not violate Sec. 111.70(4)(cm)2. Accordingly, no violation of this section has been found.

Alleged Violation of Secs. 111.70(3)(a)4 and 1 (Bad Faith Bargaining)

The MERA duty to bargain is enforced by Sec. 111.70(3)(a)4, Stats., and derivatively by Sec. 111.70(3)(a)1, Stats. The duty to bargain in good faith is broad and the standards which define it are fact-driven. The Commission considers the "totality of the conduct" in determining whether a party has failed to bargain in good faith. See ADAMS COUNTY, DEC. NO. 11307-A (Schurke, 4/73), AFF'D (WERC, 5/73). Unlawful bargaining conduct is sometimes described as "bargaining in bad faith". In this case, the Association raises two separate bad faith bargaining allegations. Each is addressed below.

The first is that the District engaged in bad faith bargaining by not agreeing to a simultaneous exchange of initial bargaining proposals. Based on the following rationale, the Examiner does not find this contention persuasive. It is noted at the outset that while the parties are required to negotiate over the format for the exchange of initial proposals, MERA does not require either party to agree to the other's proposal. In this case, the record indicates that in 1997 the Association never proposed that the parties simultaneously exchange their initial proposals. That being so, the District did not condition bargaining on the Association providing its proposal first. While the District has consistently maintained the position over the years that the Association present its proposal first, there is no evidence either in past years, or in this case, that the District has ever refused to bargain over the format for the exchange of proposals. Additionally, there is no evidence that there has ever been a formal proposal put forth by the Association for a different format. Instead, the Association has acquiesced to the District's suggested method of exchanging initial proposals. If the Association does not like the way initial proposals are exchanged, it is free to propose a different method.

The private sector NLRB cases which the Association cites to support its position that bad faith bargaining occurred here are not dispositive. In those cases, the employers placed onerous and unreasonable conditions on the manner in which bargaining was conducted. In this case though, the District never placed any conditions on bargaining. All that happened is that the District proposed the Association provide its proposal first with the District responding at a later date, and the Association acquiesced to this method of exchange.

The Association's main objection to the lack of a simultaneous exchange is that it believes the District obtained an advantage in bargaining by being able to see the Association's proposal (particularly its economic proposal) before it (i.e. the District) presented its initial proposal. In all candor, that probably occurred. Be that as it may, that does not make it lawful. Such is the nature of collective bargaining. As Examiner Houlihan noted in NICOLET:

> This case really boils down to a situation in which both the employer and the union sought to achieve an exchange format most suitable to their own particular needs and advantage...[W]ithout an exchange of proposals, bargaining cannot take place.
>
> Id., slip. op. at 6 and 7.

Based on the above, it is held that the District did not engage in bad faith bargaining by not agreeing to a simultaneous exchange of proposals. Thus, the conduct just referenced did not violate either Secs. 111.70(3)(a)4 or 1, Stats.

The second bad faith bargaining allegation is that the District sent Paulson to the bargaining table on October 2, 1997 without vesting her with any authority to bargain on that date. The factual basis for this claim is that Paulson stated at the October 2 meeting that she was not going to respond with a bargaining proposal on that date because she needed to study, cost, and discuss the Association's proposal and receive her authority from the Board of Education's Negotiating Committee. She later reaffirmed this point in writing. The Examiner finds this record evidence does not constitute bad faith bargaining. In so finding, it is noted at the outset that the Association was aware the District was not going to present a proposal on October 2 and nonetheless agreed to meet on that date knowing that just the Association's proposal would be presented. Since only the Association was presenting its proposal on October 2, it is not surprising that Paulson declined to make a proposal to the Association on that date. Additionally, her statement that she was not prepared to respond on that date does not mean she lacked the authority to negotiate on behalf of the District. In point of fact, Paulson was the District's designated bargaining representative and had the authority to negotiate on the District's behalf on October 2, 1997. The fact that she was not willing to make a proposal on that date without first checking with the Board's Negotiating Committee does not lessen her authority. Based on the above, it is held that the Association has not proved that Paulson lacked authority to negotiate for the District on October 2, 1997. Thus, the conduct referenced above did not constitute bad faith bargaining and therefore did not violate either Secs. 111.70(3)(a)4 or 1, Stats.

Alleged Violation of Sec. 111.70(3)(c)

Finally, the Association contends that Paulson violated Sec. 111.70(3)(c). That section provides as follows:

> (c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any action prohibited by par. (a) or (b).

This section recognizes that prohibited practices can also be committed by a person.

The Association failed to prove a violation of this section. Paulson is an employe of the District. To the extent that she took actions in this case, it was in her capacity as an employe of the District (specifically, her capacity as the District's Employee Relations Supervisor). At all times herein, she acted within the scope of her authority. No evidence was presented that Paulson acted in her individual capacity for which she should be found individually liable. As a result, there is no basis in the record for concluding that Paulson violated this section by her conduct herein. Accordingly, no violation of Sec. 111.70(3)(c), Stats. has been found.

In summary then, it is concluded that the District's and Paulson's actions were not unlawful and did not violate Secs. 111.70(4)(cm)2, 111.70(3)(a)4 or 1, or 111.70(3)(c), Stats. The complaint has therefore been dismissed.

Attorneys Fees

The District contends it should be awarded its costs and attorneys fees for defending itself in this action.

The Commission's test for awarding attorneys fees is strict. Only in the "exceptional" case is such an "extraordinary remedy" warranted. Specifically, attorneys fees are awarded "only where a litigant's position demonstrates extraordinary bad faith." HAYWARD COMMUNITY SCHOOL DISTRICT, DEC. NO. 24259-B (WERC, 3/88), at p. 5.

While the District has prevailed in this case, it cannot be said that the Association's charges against the District were frivolous. As a result, the Association's charges do not rise to the level of "extraordinary bad faith" which is needed to warrant awarding costs and attorneys fees. Accordingly, the Examiner has denied the District's request for its costs and attorneys fees.

Dated at Madison, Wisconsin this 7th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
29233-A.D