STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CENTRAL HIGH OF WESTOSHA ESP,
and TERESA D. WATSON, Complainants,

vs.

CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA,
and GERALD SORENSEN, District Administrator, Respondents.

Case 29
No. 57583
MP-3523

Decision No. 29671-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708-8003, on behalf of the Complainants.

Davis & Kuelthau, S.C., by **Attorney Daniel G. Vliet**, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, WI 53202-6613, on behalf of the Respondents.

ORDER DENYING MOTION TO DISMISS AND/OR DEFER TO ARBITRATION

Central High of Westosha ESP and Teresa D. Watson, herein referred to as the Complainants, filed a complaint on May 26, 1999, with the Wisconsin Employment Relations Commission alleging that the Central High School District of Westosha and Gerald Sorensen, District Administrator, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act by various conduct affecting Ms. Watson. On June 28, 1999, the Complainants amended their complaint, alleging that the Respondents engaged in further conduct affecting Ms. Watson that violates

Secs. 111.70(3)(a)1 and 3, Stats. On July 27, 1999, the Commission appointed Karen J. Mawhinney to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing date of October 14, 1999, was established between the Examiner and the parties. On July 27, 1999, the Respondents filed a Motion to Dismiss and/or Defer to Arbitration. The Complainants responded to the Motion on August 4, 1999, and the Respondents filed a further reply in support of the Motion on August 20, 1999. The Examiner has considered the arguments of the parties and concludes that the Motion to Dismiss and/or Defer to Arbitration is denied.

NOW, THEREFORE, it is

ORDERED

That the Motion to Dismiss and/or Defer to Arbitration is denied.

Dated at Elkhorn, Wisconsin, this 25th day of August, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS AND/OR DEFER TO ARBITRAITON

The Respondents state that the allegations in paragraphs three through nine of the Complaint are the same allegations that were raised in a grievance filed by the Complainants on March 2, 1999, and which would be the subject of a grievance arbitration proceeding if the Complainants pursue grievance arbitration as provided for under Article XIV of the collective bargaining agreement. Further, the Complainants can file grievances over any of the issues raised in the amended complaint regarding the alleged loss of compensation suffered by Ms. Watson since those issues fall under the grievance arbitration process. Thus, the Complaint raises the same claims that either are or could be the subject of a pending grievance, and the Respondents ask that the Complaint be dismissed and/or deferred to grievance arbitration.

The Complainants state that in the grievance there is no allegation that the Employer engaged in discriminatory conduct due to Ms. Watson's union activity. It is not reasonable to assume that an arbitrator would resolve the underlying dispute alleged in the Complaint due to the narrowness of the issue presented in the grievance. That issue narrowly focused on challenging the Employer's exercise of its discretion under management rights to schedule employes. The issue in the Complaint has remained separate from the allegations contained in the grievance. The Complainants conclude by stating that the Commission should exercise jurisdiction over the Complaint because the allegations are wholly separate and apart from the allegation raised in the grievance.

The Respondents further argue that the Complainants have not filed grievances over the alleged loss of one-half hour of compensation, the alleged loss of holiday compensation, the reduction in Ms. Watson's summer hours or lunch hour, which are all subjects of this complaint. They have not appealed the pending grievance over the work schedule to arbitration. They contend that they should not be required to comply with the negotiated procedures for resolving contract disputes but should be allowed to circumvent them by placing this matter before the Commission. The issue of the Employer's "bad faith" would be before the arbitrator, and that issue may be resolved in the arbitration forum. The failure to raise the issue of motive in the grievance suggests that they did not approach the grievance in good faith and should not be rewarded for failing to make a full disclosure of all their positions. The Complainants are seeking reinstatement to the position of part-time secretary for Ms. Watson and back pay for the holiday and time spent with a supervisor discussing a change in hours. Those are the same remedies that they would be seeking in the grievance process. The Respondents ask that the Complaint be dismissed or that the Complainants be required to use the grievance and arbitration procedures in the bargaining agreement.

DISCUSSION

Because of the drastic consequences of denying an evidentiary hearing, on a Motion to Dismiss, the Complaint must be liberally construed in favor of the Complainants and the Motion must be denied except where no interpretation of the facts alleged would enable the Complainants to relief. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 15915-B (HOORNSTRA, 12/77). The essence of the complaint in this matter is that the Respondents have discriminated against the Complainant Ms. Watson for her involvement in union activity and have interfered with employes' rights to engage in concerted activity. The Complainant states that the grievance is challenging the Employer's exercise of its discretion to schedule employes. Thus, dismissal is clearly inappropriate.

The Commission's criteria for deferral to arbitration are:

> (1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
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> (2) The collective bargaining agreement must clearly address itself to the dispute; and
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> (3) The dispute must not involve important issues of law or policy. SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94).

The Complaint, as amended, basically contends that the Employer discriminated against Ms. Watson and interfered with her concerted activity by changing her hours from part-time to full-time, by denying her 30 minutes of pay for a meeting after the workday, by changing a paid leave over vacation breaks, by having to seek permission to work on snow days, by reducing her summer hours, and by eliminating a paid lunch hour. Of those six events, only one has been grieved, according to the Respondent – the change of hours from part-time to full-time. While the other five matters could be grieved, an arbitration decision could not address the allegations of discrimination for union activity and interference with the right to engage in concerted activity. Those claims are rooted in the statute and not in the contract, and they are important issues of law. Moreover, there are no grievances pending and the parties have not agreed to arbitrate these allegations. Thus, deferral is inappropriate.

The hearing is to proceed as scheduled on October 14, 1999.

Dated at Elkhorn, Wisconsin, this 25th day of August, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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