

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**STURGEON BAY SCHOOL DISTRICT EMPLOYEES,
LOCAL 1658, COUNCIL 40, AFSCME, AFL-CIO, Complainant,**

vs.

STURGEON BAY SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.

Case 40
No. 62480
MP-3949

Decision No. 30695-A

Appearances:

Davis & Kuelthau, S.C., by **Clifford B. Buelow**, Attorney at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Complainant.

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

On June 20, 2003, Sturgeon Bay School District Employees, Local 1658, Council 40, AFSCME, AFL-CIO filed with the Commission a complaint alleging that the Sturgeon Bay School District Board of Education has violated Section 111.703(a)(5) and derivatively violated Section 111.70(3)(a)1, Stats., by refusing to submit two grievances to final and binding arbitration. On August 28, 2003, the Commission appointed Coleen A. Burns, an examiner on its staff, to conduct a hearing and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. A hearing was held on October 16, 2003 in Sturgeon Bay, Wisconsin. The record was closed on March 4, 2004, upon receipt of post hearing briefs. The Examiner, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

No. 30695-A

FINDINGS OF FACT

1. Sturgeon Bay School District Employees, Local 1658, Council 40, AFSCME, AFL-CIO, hereafter Union or Complainant, is the exclusive collective bargaining representative of certain employees of the Sturgeon Bay School District. The Union's principal offices are located at 1311 Michigan Avenue, Manitowoc, Wisconsin 54220. At all times material hereto, Mr. Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, has represented the Union for purposes of labor contract negotiations and administration.

2. The Sturgeon Bay School District, hereafter District, is a municipal employer with principal offices located at 1230 Michigan Street, Sturgeon Bay, Wisconsin 54235. The Sturgeon Bay School District Board of Education, hereafter Respondent or Board, has the responsibility and authority to manage the operations of the District. At all times material hereto, Mr. Robert Grimmer has been the District Administrator of the District.

3. The Complainant and the Respondent are parties to two collective bargaining agreements that, by their terms, are in effect from July 1, 2000 through June 30, 2002. One agreement covers the District's professional teacher aides employees and one agreement covers the District's support staff employees. Each of these collective bargaining agreements has a grievance procedure that culminates in final and binding arbitration.

4. On or about February 18, 2002, the Union filed with the District a Step 1 grievance dated February 18, 2002. This grievance, which alleges that the District violated the parties' collective bargaining agreement by failing to pay overtime, was filed under the support staff contract. On or about March 8, 2002, the Union filed with the District a Step 1 grievance dated March 8, 2002. This grievance, which alleges that the District violated the contract by the manner in which it displaced employees, was filed under the teacher aides contract. Each grievance was appealed by the Union to Step 2 and Step 3 of the grievance procedure. A Step 3 meeting on each grievance was scheduled for June 12, 2002. At this Step 3 meeting, statements were made by Union Representative Rainford; Board President Joel Kitchens and Board Attorney Clifford Buelow. Following discussions between the parties, the Board adjourned the Step 3 meeting, without providing a Step 3 response to the Union.

5. By letters dated June 28, 2002, Union Representative Rainford filed with the Wisconsin Employment Relations Commission a "Request to Initiate Grievance Arbitration" on the grievance dated March 8, 2002 and a "Request to Initiate Grievance Arbitration" on the grievance dated February 18, 2002. District Attorney Buelow responded to each request with a letter dated July 15, 2002. In each letter, District Attorney Buelow states as follows:

The School District of Sturgeon Bay objects to the Union's request for arbitration because the Union has failed to timely exhaust all prior steps of the grievance procedure. Accordingly, the District requests the Commission return the Union's petition or grievance arbitration.

The Respondent has refused, and continues to refuse, to arbitrate the grievance dated February 18, 2002 and the grievance dated March 8, 2002.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Sturgeon Bay School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and, at all times material hereto, the Respondent Sturgeon Bay School District Board of Education has acted on behalf of the District.

2. Complainant Sturgeon Bay School District Employees, Local 1658, Council 40, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. Respondent's refusal to process the grievance dated February 18, 2002 and the grievance dated March 8, 2002 through final and binding arbitration constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

To remedy its violation of Sec. 111.70(3)(a)5 and derivatively Sec. 111.70(3)(a)1, Stats., the Respondent Sturgeon Bay School District Board of Education, its officers and agents, shall immediately take the following affirmative action that the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

- (a) Process the support staff grievance dated February 18, 2002 and the teacher aides grievance dated March 8, 2002 through final and binding arbitration;

- (b) Notify all of its employees represented by Complainant Sturgeon Bay School District Employees, Local 1658, Council 40, AFSCME, AFL-CIO, by posting in conspicuous places on its premises where employees are employed, copies of the Notice attached hereto and marked as Appendix "A". The Notice shall be signed by the President of the Sturgeon Bay School District Board of Education and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to insure that said Notice is not altered, defaced or covered by other material.

- (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this order what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 7th day of September, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL process through final and binding arbitration the support staff grievance dated February 18, 2002 and the teacher aides grievance dated March 8, 2002 which have been filed by Sturgeon Bay School District Employees, Local 1658, Council 40, AFSCME, AFL-CIO.

By

President,
Sturgeon Bay School District Board of Education

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE
HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY
OTHER MATERIAL**

STURGEON BAY SCHOOL DISTRICT

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

On June 20, 2003, Complainant filed a complaint of prohibited practices alleging that the Respondent has violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to submit two grievances to final and binding arbitration. Respondent denies that it has committed the prohibited practices alleged by the Complainant.

POSITIONS OF THE PARTIES

Association

The complaint was filed within one year of the date that Respondent refused to proceed to arbitration. The grievances arose and were appealed to arbitration prior to the expiration date of the collective bargaining agreement. Complainant's claim of prohibited practices is timely and appropriately before the Commission.

Respondent challenges the Complainant's request to initiate arbitration on the basis that Complainant has not satisfied the terms of Article 17 – Grievance Procedure – Step 3: “Present the grievance to the Board”. Under the parties' collective bargaining agreements, such a challenge is to be decided by the grievance arbitrator. The Commission has consistently found that procedural defenses to arbitrability are reserved for determination by an arbitrator and are not valid defenses to a prohibited practices claim that the municipal employer has refused to proceed to arbitration.

By refusing to arbitrate on the basis of procedural issues, the Respondent has violated the terms of the collective bargaining agreement and, thus, has violated Section 111.70(3)(a)5 and 1, Stats. The Commission should sustain Complainant's charges and order all appropriate remedy including, but not limited to, an order directing the Respondent to proceed to arbitration.

Respondent

The relevant collective bargaining agreements provide that the Union “shall present” the grievance to the Board of Education at the Step 3 grievance hearing. The Union's representative at the Step 3 grievance hearing expressly and adamantly refused to present the grievances to the Board of Education because he believed that the Board was biased and his presentation would be a “waste of time.” By failing to comply with, and exhaust, Step 3 of the grievance procedure, the Union deprived the Board of Education of its right, and its obligation, to hear and review the grievances prior to arbitration.

Respondent acknowledges that there is a presumption that issues pertaining to interpretation of a collective bargaining agreement (including its grievance procedure) should be deferred to arbitration for resolution. Respondent submits, however, that this case presents an extreme situation of bad faith and that, in any prohibited practices complaint which seeks to compel arbitration, there must be a requirement that the complaining party first have attempted in good faith to minimally comply with the grievance procedure it seeks to enforce. To conclude otherwise, provides Union representatives acting in bad faith with a license to turn grievance arbitration procedures into sham proceedings.

Given the unusual conduct of the Union's representative, a rule denying the complaint will have a truly limited effect upon public employer/union relations in general, while both preserving the potential effectiveness of the parties' grievance procedure and appropriately chastising the Union representative's egregious behavior. In the alternative, and only in the alternative, the Respondent acknowledges that the Examiner, instead of entering an Order compelling arbitration, may order the parties to rehear the Grievances at Step 3 of the grievance procedure with appropriate sanction given to the Union "to present" the grievances.

DISCUSSION

The Complainant and the Respondent are parties to two collective bargaining agreements that, by their terms, are in effect from July 1, 2000 through June 30, 2002. One agreement covers the District's teacher aides and one agreement covers the District's support staff. Each of these collective bargaining agreements has a grievance procedure that culminates in final and binding arbitration.

It is undisputed that Respondent has refused to arbitrate a support staff grievance dated February 18, 2002 and a teacher aides grievance dated March 8, 2002. Complainant argues that Respondent's refusal to proceed to arbitration on the two grievances is a violation of Sec. 111.70(3)(a)5, Stats., and, derivatively, a violation of Sec. 111.70(3)(a)1, Stats.

Pursuant to Sec. 111.70(3)(a)5, it is a prohibited practice for a municipal employer:

To violate any collective bargaining agreement previously agreed upon by the parties..., including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award where the parties have agreed to accept such award as final and binding upon them.

To violate Sec. 111.70(3)(a)5, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats. CITY OF LACROSSE, DEC. NO. 29954-C (Burns, 6/01); AFF'D BY OPERATION OF LAW, DEC. NO. 29954-D (WERC, 7/01)

In its Answer to the Complaint, Respondent claims, as affirmative defenses, that the support staff is not entitled to arbitrate its grievance because there is no collective bargaining agreement currently in force between the parties and that the matters complained of are barred by the applicable statute of limitations. Inasmuch as Respondent did not address either defense in post-hearing brief, the Examiner concludes that Respondent has abandoned these two defenses.

In its Answer Respondent also claims, as an affirmative defense, that it has no duty to arbitrate the two grievances because Complainant failed to “present” the grievances at the Step 3 hearing, with the result that the Complainant has failed to exhaust the grievance procedure and/or timely process the grievances. This defense was addressed by the Respondent in its post-hearing brief and will be considered by the Examiner.

IN SAUK PRAIRIE SCHOOL DISTRICT, DEC. NO. 15282-B (WERC, 1978), the Commission was presented with an analogous situation. In that case, the Commission stated as follows:

The Examiner’s Conclusion of Law that the Respondent did not violate Section 111.70(3)(a)5 of the MERA by its admitted refusal to proceed to binding arbitration was based on the Complainant’s failure to exhaust the underlying steps of the grievance procedure. As the Complainant correctly points out, this conclusion is necessarily bottomed on an interpretation and application of the procedural requirements of the agreement which, absent special circumstances not present here, 5/ should be left to the ultimate forum selected by the parties for interpreting and enforcing the terms of the agreement – the arbitrator.

5/ E.g. in MILWAUKEE BOARD OF SCHOOL DIRECTORS, (12028-A, B) 9/74, the Commission interpreted and applied the procedural requirements of the agreement because the dispute over the proper application of those requirements had caused a general breakdown in the operation of the grievance procedure. Here there is no such breakdown and the Complainant does not seek an order interpreting and enforcing the requirements but instead seeks an order for arbitration wherein those requirements can be interpreted and enforced if appropriate.

In cases where a collective bargaining agreement does not provide for a final and binding method of resolving disputes over the interpretation and application of its terms, the Commission has consistently held that the complaining party must first exhaust the grievance procedure before the Commission will consider the merits of a claim that the collective bargaining

agreement has been violated. 6/ This requirement, which is in accord with federal law, 7/ is based on the strong public policy favoring the voluntary resolution of labor disputes

6/ STANLEY BOYD AREA SCHOOLS, (12504-A) 11/74; LAKE MILLS JT. SCHOOL DISTRICT NO. 1, (11529-A, B 8/73); AMERICAN MOTORS CORPORATION, (7488) 2/66.

7/ REPUBLIC STEEL vs. MADDOX, 379 US 650, 58 LRRM 2193 (1965).

and is clearly within the Commission's jurisdiction to interpret and enforce the terms of the agreement, including its procedural requirements. In addition, the Commission and courts 8/ have held that where an individual employee seeks a determination interpreting or enforcing the

8/ UNIVERSITY OF WISCONSIN-MILWAUKE, (11457-F) 12/77; MAHNKE v. WERC, 66 Wis. 2D 524 (1975); and VACA v. SIPES, 379 US 150, 58 LRRM 2193 (1965). The Examiner erroneously relied on such a case: AMERICAN CAN COMPANY, (14688-A) 9/76.

terms of the collective bargaining agreement which provides for arbitration, and an objection is raised regarding the exclusive right of the Union to invoke the arbitration step of the procedure, the Complainant must first establish that he or she attempted to utilize and exhaust the procedure provided and was frustrated in that effort by the Union's failure to meet its duty of fair representation. However, when a union seeks to invoke its exclusive right to proceed to final and binding arbitration of a grievance, any questions of procedural arbitrability or regularity that may have arisen during the course of the processing of the grievance do not constitute proper grounds for denying an order for arbitration – they are grist for the mill of the arbitrator.

We recognize the potential value that the advisory arbitration panel may have in contributing to a voluntary resolution of the instant grievance, because of its tri-partite nature. However, the fact remains that the advisory panel is merely an intermediate step in the negotiated procedure, which, if the grievance

remains unresolved, is itself ultimately interpreted and enforced by the arbitrator. 9/

9/ It is partly for this reason that the undersigned must reject the Respondent's claim that the Commission should herein enforce the procedural requirements of the contract in order to preserve the "finality" of the panel's action. In fact, the panel's action may not be final.

Here, for reasons that may or may not have been correct, the advisory arbitration panel never ruled on the merits of the grievance. It is apparently the Complainant's theory that the panel step could be bypassed because of its failure to meet within ten days of the answer at the last preceding step. The Respondent obviously disagrees with that interpretation, and apparently believes that, in either event, failure to strictly adhere to the time limit in question does not result in an automatic right on the part of either party to move the grievance to the next step. These issues can be presented to the arbitrator. If the arbitrator agrees with the Respondent's position and concludes that the grievance is not ripe for arbitration because the merits have never been considered by the panel, the arbitrator can, and probably should, remand it to the advisory arbitration panel. 10/ However, we agree with the Complainant that the Examiner's incursion into those issues and the relative equities of the parties' respective positions were outside the appropriate scope of the issue before him.

10/ See Elkouri and Elkouri, How Arbitration Works, (BNA, 1973) at p. 160, n. 229.

Because we have concluded that all procedural issues in this case are appropriately for the arbitrator, it is unnecessary to consider the parties' arguments with regard to whether the Complainant "participated" in the proceeding before the advisory arbitration panel, or their respective arguments with regard to the other procedural issues involved. For the above and foregoing reasons, we have affirmed the Examiner's Findings of Fact. However, we have reversed his Conclusion of Law, and have entered an appropriate remedial order.

In the present case, the relevant collective bargaining agreements provide for final and binding grievance arbitration. There is no assertion that the two grievances are not

substantively arbitrable. Applying the principles enunciated in SAUK PRAIRIE to the present case, the Examiner concludes that Respondent's remaining "defenses" present "questions of procedural arbitrability or regularity that may have arisen during the course of the processing of the grievance" and, thus, do not constitute proper grounds for denying an order for arbitration, but rather "are grist for the mill of the arbitrator."

The Examiner's conclusion is also supported by the Commission's decision in MILWAUKEE COUNTY, DEC. NO. 28944-B (10/97). In that decision, which also alleged a refusal to arbitrate, the Commission stated:

We note that the County has raised a number of procedural defenses. We are not the forum in which these defenses should be raised. Nor is this the appropriate forum for us to express *any* view as to the merits of these defenses. That is a matter solely for the arbitrator to determine. . . .

To be sure, in SAUK PRAIRIE, the Commission recognized that there might be special circumstances, such as a general breakdown in the operation of the grievance procedure, in which it would be appropriate for the Commission, rather than a grievance arbitrator, to interpret and apply the procedural requirements of the labor contract. In CITY OF CUDAHY, DEC. NO. 17990-B, 18417-A (5/81), AFF'D BY OPERATION OF LAW, DEC. NO. 17990-C, 18417-B (6/81) Examiner Stuart S. Mukamal recognized this special circumstance, as well as special circumstances involving "situations where a party waives or forfeits its right to submit such issues to arbitration." Assuming, *arguendo*, that Respondent's witness testimony regarding the conduct of Complainant Representative Rainford is credited, neither the evidence of such conduct, nor any other record evidence, would warrant the conclusion that this case presents special circumstance which make it appropriate for the Commission, rather than the grievance arbitrator, to interpret and apply the procedural requirements of the labor contract.

Conclusion

By refusing to proceed to arbitration on the grievances dated February 18, 2002 and March 8, 2002, the Respondent has violated an agreement to arbitrate questions arising under the parties' contract and, thereby, has committed prohibited practices within the meaning of

Sec. 111.70(3)(a)5, Stats., and, derivatively, has violated Sec. 111.70(3)(a)1, Stats. The appropriate remedy for Respondent's violation of MERA is to order the Respondent to proceed to arbitration on the two grievances and to post an appropriate notice.

Dated at Madison, Wisconsin, this 7th day of September, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

