

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS,
and **MARTY LEXMOND, DIRECTOR OF SCHOOL INNOVATION**, Respondents.

Case 464
No. 67984
MP-4425

Decision No. 32593-B

Appearances:

Richard Saks, Hawks Quindel, Attorneys at Law, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Milwaukee Teachers' Education Association.

Donald L. Schriefer, Assistant City Attorney, 200 East Wells Street, Suite 800, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Board of School Directors and Marty Lexmond.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On May 5, 2008, the Milwaukee Teachers' Education Association filed a complaint with the Wisconsin Employment Relations Commission asserting that the Milwaukee Board of School Directors and Marty Lexmond had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 4, Stats. Efforts by Commission staff to conciliate the matter were unsuccessful and on February 24, 2009, the Respondents filed an answer denying that any prohibited practices had been committed.

Hearing on the complaint was held on March 4, 2009 in Milwaukee, Wisconsin before Examiner Michael R. O'Callaghan. The parties thereafter filed written argument-the last of which was received June 29, 2009.

No. 32593-B

Due to unavailability of Examiner O'Callaghan, this case was reassigned to Examiner Peter G. Davis. Examiner Davis has consulted with Examiner O'Callaghan as to witness demeanor.

Having reviewed the record, I make and issue the following

FINDINGS OF FACT

1. Milwaukee Board of School Directors, herein the Board, is a municipal employer and, at all times material herein, Marty Lexmond was functioning as an agent of the Board.

2. Milwaukee Teachers' Education Association, herein the MTEA, is a labor organization that serves as the exclusive collective bargaining representative of certain employees of the Board.

3. The Board operates a Community High School, the day-to-day functioning of which is determined, at least initially, by the teachers employed by the Board at the school. Said teachers are represented for the purposes of collective bargaining by the MTEA and covered by/governed by any agreements reached by the Board and the MTEA.

4. The Board and the MTEA agreed upon a 2007-2008 school year calendar that, among other matters, identified which days were student contact days and which were not. If a student contact day identified in the 2007-2008 calendar agreement was to be used for a full day of in-service training when students would not be present, agreement between the Board and the MTEA was required.

5. March 31, 2008 was identified in the 2007-2008 school calendar agreement as a student contact day. The teachers at Community High School decided that the day would be better used as a full day of in-service training. The teachers notified the Board of their decision and began making preparations including cancellation of student bus service and food service.

6. On Monday, March 24, 2008, the Board drafted a proposed agreement for the MTEA's consideration that would designate March 31, 2008 as an in-service day at Community High School. The proposed agreement was received by the MTEA on March 25, 2008. On March 27, 2008, the MTEA advised the Board that it did not agree to make March 31, 2008 an in-service day at Community High School.

7. On March 27, 2008, the Board advised the teacher leaders at Community High School that the MTEA had not agreed to make March 31, 2008 an in-service day and that holding the in-service would violate the contract between the Board and the MTEA. The teacher leaders responded by indicating that they nonetheless would proceed to hold an in-service on March 31, 2008. Later that day, the Board sent the following memo to the teacher leaders:

To: Jason O'Brien, Roxanne Mayeur, Dream Gunther, Community High School Teacher Leaders

From: Marty Lexmond, Department of School Innovation

Date: March 27, 2008

RE: MOU for Professional Development Days

As you are aware, the MOU to provide an agreement regarding the implementation of three additional professional development days for staff at Community High School has been completed and signed by MPS, but has not been signed by the MTEA. Because your first additional professional development day is scheduled for Monday, March 31, 2008, it is important that you carefully consider the decision to implement the activities scheduled for this day.

Implementing the professional development activities without the signed MOU creates the possibility of a grievance being filed by the MTEA. Should a grievance be filed and the district is found to be at fault, any costs associated with resolving the grievance would be provided for through the Community High School budget.

As a charter school the plan to use a day differently, that would otherwise entail student instruction all day, is appropriate. Having an agreed upon MOU that defines the terms of how this time will be used when it varies from the negotiated agreement would be ideal. March 31, 2008 is still a negotiated paid workday for all staff assigned to Community High School. Because the MOU is not agreed upon at this time, it is your decision to determine if the implementation of the professional development day on March 31, 2008, will proceed as planned.

During a phone conversation with Graciela Pequeño and Arlene Sershon on Thursday, March 27, 2008, you indicated that you will proceed as planned. Please sign below confirming this plan and your agreement with the information in this memo. Please fax your response to 414-475-8470 to the attention of Graciela Pequeño no later than 12:00 noon on Friday, March 28, 2008.

8. On March 31, 2008, Community High School held a full day of in-service training and the Board so advised the MTEA.

Based on the above and foregoing Findings of Fact, I make and issue the following

CONCLUSIONS OF LAW

1. Because Marty Lexmond was at all times material herein functioning as an agent of the Board, he has no independent liability as a Respondent in this matter.

2. By failing to order the teacher leaders and teachers at Community High School not to use March 31, 2008 as an in-service day and failing to take appropriate disciplinary action against the teachers who disobeyed such an order, the Milwaukee Board of School Directors committed a prohibited practice within the meaning of Sec. 111.70(3)(a) 4 and derivatively Sec. 111.70(3)(a) 1, Stats., but did not commit an independent prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following

ORDER

1. The complaint against Marty Lexmond is dismissed.
2. The independent alleged violation of Sec. 111.70(3)(a)1, Stats., is dismissed.
3. To remedy the prohibited practice found in Conclusion of Law 2, the Milwaukee Board of School Directors, its officers and agents, shall take the following action:
 - A. Cease and desist from failing to order employees not to act in violation of agreements reached by the Milwaukee Board of School Directors and the Milwaukee Teachers' Education Association and from failing to appropriately discipline employees who fail to follow such an order.
 - B. Within 20 days of the date of this Order, send the following letter to the Milwaukee Teachers' Education Association:

Whenever the Milwaukee Board of School Directors becomes aware that employees of the Board will be taking actions that violate an agreement between the Board and the Milwaukee Teachers' Education Association, we will order the employees not to violate the agreement and we will take appropriate disciplinary action against any employees who disobey our order and violate the agreement.

- C. Provide a copy of this decision to all teachers at Community High School.
- D. Within 20 days of the date of this Order, advise me and the Milwaukee Teachers' Education Association as to the action taken to comply herewith.

Dated at Madison, Wisconsin, this 9th day of September, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

MILWAUKEE BOARD OF SCHOOL DIRECTORS

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

From my perspective, the relevant facts are not in dispute and have been recited in the Findings of Fact. The question then becomes whether the Board thereby violated its obligations under the Municipal Employment Relations Act. I conclude that it did by failing to take appropriate action to stop what the Board acknowledges was an employee violation of the 2007-2008 calendar agreement previously reached with the Milwaukee Teachers' Education Association.

In reaching this conclusion, I acknowledge the reality of the very unusual and not likely to recur circumstances presented by this case and the fire and brimstone that has nonetheless been generated by this litigation. I further acknowledge the reality that with more timely communication by all involved, the MTEA would have signed the in-service agreement and life would have gone on without incident. However, such communication did not occur, the in-service agreement was not signed, the Board knew that its employees were going to violate the 2007-2008 calendar agreement, and the Board took no effective action to stop the violation. In such circumstances, the Board violated its collective bargaining relationship with the MTEA and thereby violated Sec. 111.70(3)(a) 4, Stats. and derivatively Sec. 111.70(3)(a) 1, Stats.¹

In reaching this conclusion, I reject as irrelevant the reasons why the MTEA did not sign the modification to the 2007-2008 calendar agreement. The MTEA was entitled to rely on the 2007-2008 agreement for its duration and thus had no obligation to modify the agreement for any reason. I further reject as irrelevant to the existence of a prohibited practice that it was employees represented by the MTEA who violated the agreement. The Board, not the MTEA, is the employer of the employees and has an obligation to compel employees to conform to the obligations the Board has chosen to incur by agreement with the MTEA. When it fails to do so, the Board violates and dishonors its collective bargaining relationship with the MTEA.

When determining the appropriate remedy for a prohibited practice, the Commission has broad discretion. The MTEA asks by way of affirmative remedy that an appropriate notice to be posted in all schools. In the unique and unlikely to be repeated circumstances herein, including the fact that the violators of the 2007-2008 calendar agreement were MTEA represented employees and all parties (including the teachers at Community High School) failed to communicate in a fashion that would have avoided the need for this litigation, I

¹ In the unique circumstances of this case, I am satisfied that the Board's conduct did not independently violate Sec. 111.70(3)(a)1, Stats.

conclude that a notice is not appropriate but that the Board shall provide the MTEA with written confirmation that it understands and will meet its obligations should this scenario ever recur and shall provide a copy of this decision to the teachers at Community High School.

Dated at Madison, Wisconsin, this 9th day of September, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner