

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**NEENAH JOINT SCHOOL DISTRICT, Complainant,**

vs.

**NEENAH EDUCATIONAL SUPPORT STAFF ASSOCIATION, Respondent.**

Case 16  
No. 68265  
MP-4451

**Decision No. 32773-A**

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**DECISION AND ORDER DENYING RESPONDENT'S  
MOTIONS TO STRIKE AND TO DISMISS THE COMPLAINT**

On September 4, 2008, the Neenah Joint School District (herein the District) filed a Complaint with the Wisconsin Employment Relations Commission (herein the Commission) alleging that the Neenah Educational Support Staff Association (herein NESPA) had committed prohibited labor practices by engaging in bad faith bargaining during negotiations for a successor collective bargaining agreement contrary to Secs. 111.70(3)(b)3 and 111.70(4)(cm)6, Wis. Stats. Thereupon, the Commission appointed John R. Emery, a member of its staff, as Examiner to conduct a hearing in the matter and to issue Findings of Fact, Conclusions of Law and Orders. On June 11, 2009, the District filed an Amended Complaint. On June 15, 2009, a prehearing conference was held wherein the Examiner scheduled the matter for hearing commencing August 5, 2009 and also set deadlines for the filing of prehearing motions and responses thereto. On July 10, 2009, NESPA filed an Answer, Affirmative Defenses and Counterclaim, as well as a Motion to Dismiss the Amended Complaint and a Motion to Strike certain parts of the District's request for remedial relief contained in the Amended Complaint. On July 16, 2009, the District filed a Second Amended Complaint and responses to NESPA's motions. On July 20, 2009, NESPA filed an Answer, Affirmative Defenses and Counterclaim, as well as an Amended Motion to Dismiss and Amended Motion to Strike. On July 21, 2009, the District filed an Answer and Affirmative Defenses to the Counterclaim.

The Examiner having examined the pleadings and considered the arguments of the parties,

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NOW, THEREFORE, IT IS ORDERED that the Respondent's Amended Motion to Dismiss and Amended Motion to Strike be and hereby are denied and the matter shall proceed to hearing as scheduled, commencing on August 5, 2009.

Dated at Fond du Lac, Wisconsin, this 5th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

**NEENAH JOINT SCHOOL DISTRICT**

**MEMORANDUM ACCOMPANYING ORDER DENYING AMENDED MOTION TO  
DISMISS AND AMENDED MOTION TO STRIKE**

**BACKGROUND**

The Neenah Joint School District (the District) and the Neenah Educational Support Personnel Association (NESPA) are parties to a collective bargaining agreement. On September 4, 2008, the District filed a prohibited practice complaint against NESPA, alleging that NESPA had engaged in bad faith bargaining concerning negotiations over a successor agreement to the parties' collective bargaining agreement, which had expired on June 30, 2008. Specifically, the District alleged that NESPA had engaged in dilatory tactics by refusing to file a preliminary final offer within 14 days of its filing of a petition for interest arbitration on June 20, 2008, as required under Sec. 111.70(4)(cm)6, Wis. Stats. and had failed to make itself available for an informal investigation by the WERC Investigator. It alleged that NESPA's actions constituted refusal to bargain, contra to Sec. 111.70(3)(b)3, Wis. Stats. On June 11, 2008, the District filed an Amended Complaint alleging, in addition to the aforementioned acts, that NESPA had filed an extensive and untimely request for information one day before the scheduled investigation and had refused to file a preliminary final offer and further threatened to cancel the investigation unless and until the request was met. It further alleged that NESPA had delayed the process of filing final offers after the investigation and then argued to the interest arbitrator that its final offer should be accepted due to the length of the investigation process and certain retroactive aspects of the District's final offer. In response to the Amended Complaint, NESPA filed an Answer, Affirmative Defenses and Counterclaim, as well as a Motion to Dismiss and Motion to Strike. The Motion to Dismiss alleges that the Amended Complaint does not assert facts which would, if proved, establish a claim of bad faith bargaining, that the Commission does not have jurisdiction to adjudicate claims under Sec. 111.70(4)(cm)6 and that the issue is moot inasmuch as the parties have proceeded to interest arbitration. The Motion to Strike sought to strike certain of the District's claims for relief on the basis that the Commission lacks jurisdiction to grant the relief requested. Thereupon, the District filed a Second Amended Complaint alleging that NESPA's Counterclaim improperly objected to the District's refusal to agree to an extension of the briefing schedule in the interest arbitration. NESPA then filed an Amended Motion to Dismiss and Amended Motion to Strike reasserting the bases of its original motions and including a request to dismiss the additional claims contained in the Second Amended Complaint.

**LEGAL FRAMEWORK**

The basis for a motion to dismiss a prohibited practice complaint is set forth in Wis. Admin. Code Sec. ERC 12.04(2)(f), which states:

(f) *To dismiss.* A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make

dismissal inappropriate.

The Commission has held that, due to the extraordinary nature of a motion to dismiss and the severe consequences of denying a claim for relief without an evidentiary hearing, the pleadings must be liberally construed in favor of the complainant and the motion should only be granted if under no interpretation of the facts alleged would the complainant be entitled to relief. UNIFIED SCHOOL DISTRICT NO 1. OF RACINE COUNTY, WISCONSIN, DEC. NO 15915-B (Hornstra, 12/77).

The standard for a motion to strike was set forth in NEW LONDON SCHOOL DISTRICT, DEC. NO. 27860-A (Crowley, 11/93), wherein the Examiner stated:

In a Motion to Strike, the pleadings as well as any reasonable inferences therefrom will be liberally construed in favor of the Complainant and the Motion will not be granted unless the pleading is redundant, immaterial, impertinent, scandalous or indecent.

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Thus, while dismissal is appropriate in cases where the complaint raises no legitimate dispute of fact or law and where, if the allegations of the complaint were proven, there would be no right to relief, nevertheless the burden on a Respondent to establish that there is no legitimate basis for an evidentiary hearing is extraordinarily high.

#### **APPLICATION OF LAW TO THE PLEADINGS**

The Second Amended Complaint sets forth six counts of alleged prohibited conduct by NESPA, each of which is claimed to be a violation of Sec. 111.70(3)(b)(3), in addition to a claim that NESPA's failure to timely file a preliminary final offer was a violation of Sec. 111.70(4)(cm)6. The several counts allege that 1) NESPA failed to communicate with the Investigator regarding preferred dates for investigation and could not make itself available for investigation for over two months after the petition for interest arbitration was filed on June 20, 2008; 2) NESPA did not file a timely preliminary final offer despite requests from the District and reminders of its statutory obligation to do so; 3) on September 3, 2008 NESPA made an unreasonable demand for information prior to an investigation scheduled for September 15 and predicated its filing of a preliminary final offer of receipt of the information. NESPA threatened to cancel the investigation if the information was not provided and, despite the fact that the information was timely provided, still failed to file a preliminary final offer until September 9; 4) NESPA unreasonably delayed the process of exchanging final offers, thereby delaying the close of the investigation and interest arbitration; 5) at interest arbitration, NESPA argued that the arbitrator should accept its final offer, in part based on the length of the investigation because it would be prejudiced by certain retroactive aspects of the District's final offer; 6) NESPA's Counterclaim herein improperly objected to the District's exercise of its statutory right to file the complaints herein.

NESPA argues that, even if proven, the facts alleged in the Complaint do not establish a claim for bad faith bargaining by the Association. Specifically, as to each of the counts of the

Complaint, NESPA asserts that the Association's acts, in and of themselves, do not constitute bad faith. Further, in none of its allegations does the District assert improper motive, which is a

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necessary element of a bad faith claim. Although NESPA acknowledges that existence of improper motive is difficult to discern without an evidentiary hearing, it asserts that the pleadings do not even suggest facts that would support a claim of improper motive. The District asserts that the admissions in NESPA's Answer and Counterclaim establish that it did delay the investigation process and did not timely file a preliminary final offer, permitting a finding of wrongdoing based on specific conduct, improper motive, or totality of the circumstances. It also points out that NESPA's denials as to such matters as whether it did not communicate with the Investigator, or whether it was provided with multiple dates for investigation raise legitimate issues of fact appropriate for hearing.

In my view, based upon the pleadings alone one might have difficulty making a finding of bad faith refusal to bargain. A case is not decided on the pleadings, however, but on the evidence adduced at hearing. The pleading requirements in a case such as this are set forth in Wis. Admin. Code Sec. ERC 12.02(2), which states:

- (2) Contents. The complaint shall contain all of the following:
  - (a) The name, address, phone number, and affiliation, if any, of each complainant, and of any representative of a complainant. Fax numbers and e-mail addresses shall be included, if available.
  - (b) The name, address and phone number of each respondent, and any other party named in the complaint. Fax numbers and e-mail addresses shall be included, if available.
  - (c) A clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the provisions of s. 111.70(3), Stats., alleged to have been violated.
  - (d) A statement of the remedy or remedies the complainant is requesting the commission to order.

Based on the foregoing, the District has met its burden of citing the proper jurisdictional information and bringing forward facts sufficient to place the issues in dispute. NESPA is correct in its view that the alleged conduct, standing alone, might not support a claim of prohibited practices. It is well settled, however, that claims of bad faith bargaining often require a drawing of inferences based upon the record developed at hearing and that a finding of bad faith can be based upon not only specific conduct, but also improper motive or the totality of the circumstances. MARQUETTE COUNTY, DEC. NO. 31257-A, (Gratz, 10/3/05). Thus, a pattern of dilatory conduct throughout an investigation, if established, might support a finding of bad faith depending upon the circumstances. NESPA has asserted that its conduct in each instance was defensible, but these are assertions, not facts, and must be proven with evidence. Likewise, although NESPA has pointed

out that the District did not make specific allegations of improper motive, it is not disputed that the District has contended in its pleadings that NESPA's conduct was motivated by a desire to prevent the District from implementing certain of its proposals and

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to improve its position before the interest arbitrator. Again, these assertions must be proven, but certainly the District has done enough at this stage to place NESPA's motive in issue.

As to the Motion to Strike, NESPA argues that the District has requested relief that the Commission is not empowered to grant. In this regard, the Commission's remedial powers are established by statute and the provisions of the Wisconsin Administrative Code governing the processing of prohibited practice claims. Sec. 111.07(4), cited by both parties, addresses the Commission's powers to redress unfair labor practices, stating in pertinent part:

Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the commission deems proper.

Further, Wis. Admin. Code Sec. ERC 12.06 (2) states in pertinent part:

The order, which shall state the determination as to the rights of the parties, may dismiss or may sustain the complaint in whole or in part or require the respondent to cease and desist from the prohibited practices found and take affirmative action that shall effectuate the policies of the Municipal Employment Relations Act.

The Commission is bound in ordering relief to abide by the dictates of law, but it is clear that the Commission's authority is not only prospective but, at least in part, is intended to permit the redress of harm where not to do so would cause a party irreparable damage. Here, again, the determination of whether any resulting harm requires retroactive remedial action must be based on the totality of the record as developed at hearing and, therefore, is usually not appropriate for resolution by a Motion to Strike.

Dated at Fond du Lac, Wisconsin, this 5th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

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