STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEENAH JOINT SCHOOL DISTRICT, Complainant,

vs.

NEENAH EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, Respondent.

Case 16
No. 68265
MP-4451

Case 19
No. 69044
MP-4522

Decision No. 32773-B
Decision No. 32954-A

Appearances:

Davis & Kuelthau, S.C., by **Attorney James R. Macy**, 219 Washington Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Complainant.

Attorney Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 4, 2008, the Neenah Joint School District (herein the District) filed a prohibited practice complaint against the Neenah Educational Support Personnel Association (herein NESPA), alleging that the Respondent had violated of Sec. 111.70(3)(b) and Sec. 111.70(4)(cm), Wisconsin Statutes by failing to bargain in good faith during negotiations over the parties' successor collective bargaining agreement, which was in the midst of an interest arbitration investigation at the time. On March 16, 2009, NESPA filed a prohibited

practice complaint against the District, alleging that it had violated the *status quo* during the contract hiatus. On March 24, 2009, the District moved for consolidation of the matters and on April 9, 2009 requested that the Commissioners recuse themselves from ruling on the underlying motion. The Commissioners declined to recuse themselves and the motion was denied, whereupon the Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On June 11, 2009, the District filed an Amended Complaint, alleging additional acts of bad faith bargaining occurring subsequent to the events set forth in the original complaint. 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. NESPA's motions were dismissed by Order dated August 5, 2009 and a hearing was conducted in Neenah, Wisconsin on August 5 and 6, 2009. The proceedings were transcribed and the transcript was filed on August 20, 2009. The parties filed initial briefs by October 2, 2009 and reply briefs by October 16, 2009, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. The Neenah Joint School District, the Complainant herein, is a municipal employer maintaining its principal place of business at 410 South Commercial Street, Neenah, Wisconsin.

2. The Neenah Educational Support Personnel Association, the Respondent herein, is a labor organization maintaining its principal place of business at 921 West Association Drive, Appleton, Wisconsin

3. The Complainant and Respondent are in a collective bargaining relationship. At the time the progression of events referenced herein commenced, the collective bargaining agreement covering the period from July 1, 2005 through June 30, 2008 was still in effect, but expired while the parties were in negotiations over a successor agreement.

4. At all relevant times the respondent was represented by WEAC-Fox Valley and its staff representative was UniServ Director Terri Trimbell.

5. With respect to negotiations over a successor agreement, Article V of the collective bargaining agreement provides, as follows:

A. On or before March 1st of the year in which the Agreement expires, the Association and the employer shall simultaneously exchange bargaining proposals.

B. Negotiations will commence within thirty (30) days of the simultaneous exchange.

6. On February 6, 2008, Trimbell sent a letter to Vicki Holt, Director of Human Resources for the District, and requested that the parties waive the March 1 deadline for exchanging proposals and seek to commence negotiations in mid-April. The District contacted the local Co-President, Steve Prosek, to attempt to schedule negotiations earlier, but was unsuccessful.

7. The parties first met for negotiations on April 23, 2008, and had six bargaining sessions thereafter.

8. On June 4, 2008, the parties had a bargaining session, which ended with the parties working toward settlement, particularly on the issues of insurance contributions, co-pays and benefits for part-time employees. Another bargaining session was scheduled for June 11.

9. At the June 11 meeting, the NESPA bargaining team changed its previous posture on insurance contributions and part-time benefits and took less conciliatory positions. Prosek, who was not in attendance initially, was called to the meeting and was surprised to learn that the positions being taken by Trimbell were different than those previously held by the Association. The session ended with the parties farther apart than they had been on June 4. Another bargaining session was scheduled for June 19.

10. Prior to the June 19 bargaining session, local Co-President Mary Janness drafted a letter to be sent to the Association membership, as follows:

Dear NESPA member:

The NESPA bargaining team has been diligently working on bargaining the 2009-2010 contract. The initial exchange was on April 23 and there were four additional meetings on May 8, May 21, June 4 and June 11. The District's main concern was to address the rising costs of health, dental, and drug insurance and its impact on the NESPA's settlement.

The NESPA bargaining team has been very willing to discuss the district's concerns, but has stressed their obligation to bargain a fair and equitable offer for their members. Unfortunately, the district has cut off bargaining with the

> NESPA. The District's final offer included a salary increase which is well below the comparables and a premium share for a health/dental participants. Also, the district no longer wants to provide health/dental insurance benefits for employees working at least four hours but less than full time. All of the surrounding districts offer prorated benefits for part-time employees. Therefore, the negotiation team has determined that this final offer is unacceptable and totally out of alignment with the area settlements.
>
> Based on the district's unwillingness to bargain in good faith, the NESPA bargaining team has determined to file for mediation. The current contract includes a Memorandum of Understanding which outlines language for post-retirement benefits. This provision is only in effect for the term of this contact [sic] and cannot be guaranteed for future bargains. If you have been considering retirement and you meet the eligibility requirements, you can still receive the post-retirement benefits. However, you must inform the district of your decision to retire prior to June 30, 2008. If you have any questions regarding retirement, please feel free to contact me or Terri Trimbell, WEAC-FV Executive Director, at the WEAC-FV office, 920-731-1369.
>
> Please be assured the NESPA bargaining team has a commitment to obtain a fair and equitable settlement. The NESPA bargaining team will not settle for any offer that has no gains and only "rollbacks" for our members. We hope to have your support through this process and will do our best to keep you informed.
>
> Sincerely,
> Mary Janness
> NESPA President

11. Notwithstanding Janness' letter, the parties met again on June 19, at which time the District made a package settlement offer to the Association. Due to the imminent expiration of the contract and the difficulty with communicating to its members before that time, the NESPA bargaining team was unwilling to agree to any proration of benefits or changes in contribution levels, whereupon the meeting concluded.

12. On June 20, 2008, the District's counsel, James Macy, filed a petition for interest arbitration with the Wisconsin Employment Relations Commission and forwarded a copy of the petition and the District's preliminary final offer to Trimbell, which NESPA acknowledges Trimbell receiving the same day. The letter further asserted the District's understanding that NESPA had fourteen days within which to file its preliminary final offer.

13. After the filing of the petition, WERC staff member Sharon Gallagher was assigned as the Investigator for the interest arbitration proceeding. During virtually the entire month of July, NESPA was unavailable to meet for an investigation session due to conflicts with Trimbell's schedule, including attendance at an NEA Representative Assembly and a WEAC Summer Academy, as well as a personal vacation.

14. While she was out of town, Trimbell learned through Prosek that the District was trying to solidify a mediation date for August. Trimbell had an exchange of phone calls with Investigator Gallagher on July 30, in which she informed Gallagher that none of the proffered August dates worked for the entire NESPA bargaining team and requested additional dates in September.

15. In additional e-mail exchanges Macy objected to the ongoing delay, but Gallagher admitted that the delays were due, in part, to her not following up with Trimbell. Ultimately, on August 5 the Investigator informed Macy that she had asked NESPA for a September 15 meeting, which was ultimately agreed upon.

16. Throughout the summer of 2008, Holt made repeated requests to the NESPA officers for the Association's preliminary final offer. The Association members indicated they would attempt to obtain the offer from Trimbell and expressed frustration to Holt when they were unsuccessful.

17. As of August 28, 2008, NESPA had not yet filed its preliminary final offer. On that date, Macy sent an e-mail to Trimbell and Gallagher requesting that the offer be provided to the District not later than September 2, so that it could prepare for the mediation session. Gallagher followed up with a similar request to Trimbell on the same day. Ultimately, it was discovered that the e-mail address the District and Gallagher used for Trimbell was incorrect and she was not receiving the messages, but at the time the District was unaware of the problem.

18. By September 3, 2008 NESPA had still not filed its preliminary final offer, at which point Macy e-mailed the Investigator and pointed out that the 14 day filing deadline for a responsive preliminary final offer is statutorily mandated under Sec. 111.70(4)(cm)6. Wis. Stats. On the same day, the District filed a prohibited practice complaint against NESPA, alleging that it had failed to bargain in good faith by failing to make itself available for mediation for nearly three months after the filing of the interest arbitration petition and by failing to file a preliminary final offer within fourteen days, as required by statute.

19. On September 4, 2008 Trimbell e-mailed Paul Hauffe in the District business office and informed him that in order for NESPA to formulate a preliminary final offer in time for the mediation session he needed to provide wage and benefit costing information for all NESPA employees by the next day. Trimbell suggested that if the information was not provided it might be necessary to reschedule the September 15 meeting. Although Holt

objected to the eleventh hour nature of the request, Hauffe provided the information as requested.

20. On September 8, 2008, WERC staff member Marshall Gratz informed the parties that he was replacing Gallagher as Investigator and requested that Trimbell provide a copy of NESPA's preliminary final offer to himself and Macy. Trimbell notified Gratz that she would file NESPA's offer the next day, which she did.

21. At the September 15, 2008 mediation session the parties were unable to resolve their differences and settle the contract. The Investigator called for final offers and NESPA indicated it would not be able to submit a final offer prior to October 8. On September 16, Gratz e-mailed Macy and Trimbell to confirm that the District would submit its initial final offer on or before October 1 and NESPA would submit its initial final offer on or before October 8.

22. The initial offers were submitted on the scheduled dates. Thereafter, the parties exchanged communications and amended their offers until November 21, when the District submitted a revised final offer that was not substantively different than its previous offers. The Investigator asked NESPA whether he could close the investigation and was informed by WEAC consultant Dennis Eisenberg that Trimbell would file a response after Thanksgiving. Trimbell ultimately filed NESPA's final offer on December 20, 2008. On January 7, 2009, Gratz notified the parties that the investigation was closed.

23. After the investigation was closed, the WERC submitted a panel of arbitrators from which the parties could choose, but inadvertently the list was sent to NESPA's WEAC advisors, Eisenberg and Greg Spring, but not to Macy or Trimbell. The mistake was discovered and Macy and Trimbell were provided with copies of the list on February 25.

24. In March 2009, NESPA filed a prohibited practice against the District regarding a Memorandum of Understanding addressing food service workers. The District moved the WERC to consolidate its complaint with the NESPA action, which was denied.

25. The parties selected interest arbitrator James Engmann and an arbitration proceeding was conducted on May 12, 2009. On June 10, Trimbell asked Macy for an extension of the briefing deadline, which Macy refused. She then requested an extension from Engmann, to which Macy objected, but Engmann granted the request.

26. On June 11, the District amended its complaint to include additional allegations of bad faith against NESPA. On July 11, NESPA filed an answer and counterclaim, alleging that the District's pursuit of its complaint and addition of more charges was due to hostility toward the Association's protected concerted activity.

27. NESPA's inability to make itself available for investigation prior to September 15, 2008 did not constitute a failure to bargain.

28. NESPA's failure to file a preliminary final offer until September 8, 2008 constituted an inordinate delay, hampering the District's ability to prepare for investigation and amounted to a failure to bargain.

29. NESPA's request for information on September 4, 2008 was not made in bad faith for the purpose of further delaying the interest arbitration.

30. NESPA did not wrongfully threaten to cancel the investigation in the event that the District did not immediately comply with its information request.

31. NESPA did not unduly delay the exchange of final offers in order to delay processing the case to arbitration.

32. NESPA's argument to the interest arbitrator that the extensive passage of time supported acceptance of NESPA's offer was not done in bad faith.

33. The District's actions in filing the complaint and amended complaint, moving for consolidation of the complaints and refusing to agree to extension for filing briefs in the interest arbitration were not done in retaliation for NESPA's protected concerted activity.

Based upon the foregoing Findings of Fact, the Examiner herewith makes and issues the following

CONCLUSIONS OF LAW

1. The Complainant, Neenah Joint School District, is a municipal employer within the meaning of Section 111.70(1)(j), MERA.

2. The Respondent, Neenah Educational Support Personnel Association, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

3. NESPA's inability to make itself available for investigation prior to September 15, 2008 did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Section 111.70(3)(b)3, MERA.

4. NESPA's failure to file a preliminary final offer until September 8, 2008 constituted a refusal to bargain collectively with the municipal employer within the meaning of Section 111.70(3)(b)3, MERA.

5. NESPA's request for information on September 4, 2008 did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Section 111.70(3)(b)3, MERA.

6. NESPA's reference to possibly needing to reschedule the investigation did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Section 111.70(3)(b)3, MERA.

7. NESPA's conduct in the exchange of the final offers did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Section 111.70(3)(b)3, MERA.

8. NESPA's argument to the interest arbitrator that the duration of the case supported acceptance of its offer did not constitute a refusal to bargain collectively with the municipal employer within the meaning of Section 111.70(3)(b)3, MERA.

9. Failure to file a preliminary final offer within fourteen days after filing of an interest arbitration petition under Section 111.70(4)(cm)6, MERA is not a *per se* violation of Section 111.70(3)(b)3, MERA.

10. The District's actions in filing the complaint and amended complaint, moving for consolidation of the complaints and refusing to agree to extension for filing briefs in the interest arbitration did not interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

11. The District's actions in filing the complaint and amended complaint, moving for consolidation of the complaints and refusing to agree to extension for filing briefs in the interest arbitration did not discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner herewith makes and issues the following

ORDER

The Neenah Educational Support Personnel Association shall immediately take the following actions consistent with the Findings of Fact and Conclusions of Law set forth above:

1) Cease and Desist from inordinately delaying collective bargaining by failing to file its preliminary final offers in a timely manner.

2) Post the notice attached hereto as "Appendix A" in conspicuous places in the District's buildings where notices of the Neenah Education Support Personnel Association are posted. The Notice shall be signed by a representative of the Association and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

3) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Fond du Lac, Wisconsin, this 27th day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

APPENDIX "A"

NOTICE TO THE NEENAH JOINT SCHOOL DISTRICT

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify the Neenah Joint School District that:

> WE WILL NOT violate Section 111.70(3)(b)3 of the Municipal Employment Relations Act by inordinately delaying collective bargaining by failing to file its preliminary final offers in a timely manner.

Dated this ____ day of _____, 2009

_____ _____

NEENAH JOINT SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Neenah Joint School District (the District) and the Neenah Educational Support Personnel Association (NESPA) have been parties to a collective bargaining relationship for many years. Prior to negotiations over the successor agreement to the parties' 2005-2008 collective bargaining agreement, the parties had always successfully reached voluntary settlement on their agreements.

Article V of the collective bargaining agreement provides that the parties will exchange bargaining proposals on or before March 1 in the year that a contract is due to expire and that negotiations shall commence within thirty days after the exchange. On February 6, 2008, Terri Trimbell, UniServ Director of WEAC-Fox Valley, which represents NESPA, contacted the District and requested that the exchange of proposals occur in mid-April, to which the District ultimately agreed. The parties exchanged proposals on April 23, 2008 and met for negotiations on five more occasions. By the end of the negotiation session on June 4, 2008, representatives of both parties felt they were close to a voluntary settlement. However, at the June 11 session NESPA changed its position on a number of issues of importance to the District, including benefits for part-time employees, insurance premium contributions and issues related to the food service employees. As a result, no agreement was reached that evening and an additional meeting was scheduled for June 19. Prior to the June 19 meeting, Trimbell and NESPA Co-President Mary Janness drafted a letter to the NESPA membership indicating that, due to the District's unacceptable proposals and unwillingness to bargain in good faith, NESPA would be filing a request for mediation with the Wisconsin Employment Relations Commission (WERC). No agreement was reached at the June 19 meeting, but on June 20 the District, not NESPA, filed a petition for interest arbitration, along with a copy of its preliminary final offer with the WERC, pursuant to Sec. 111.70(4)(c)6, Wis. Stats. A copy of the petition was simultaneously forwarded to Trimbell. Sec. 111.70(4)(c)6 also requires that the other party to the collective bargaining agreement submit a responsive preliminary final offer within fourteen days of the filing of the petition. NESPA did not do so and, in fact did not file a preliminary final offer until September 9, 2008.

Upon the filing of the petition, Sharon Gallagher, a member of the Commission's staff, was assigned as Investigator to meet with the parties, facilitate negotiations if possible, and make a determination as to whether the parties were at impasse. The District sought to schedule an investigation meeting throughout July and August, but was unsuccessful in doing so. Investigator Gallagher attempted to schedule a meeting, but was unable to reach Trimbell due, in part, to an incorrect e-mail address and, in part, to Trimbell's unavailability due to vacations, conferences and workshops she had scheduled throughout the month of July. On

July 30, the District's representative, James Macy, informed Gallagher that the District was prepared to meet on either August 19 or August 25. Later that day, Trimbell informed Gallagher that the NESPA bargaining team was unavailable on the dates proffered in August and suggested a meeting in September, which Gallagher shared with Macy. Ultimately, the parties agreed to a date of September 15, 2008 for the investigation.

After the meeting was scheduled, the District continued to seek to obtain NESPA's preliminary final offer, but was unsuccessful. Finally, on September 4, 2008, the District filed the instant action. The same day, Trimbell contacted the District and informed the administration that NESPA required a significant amount of costing information from the District before it could prepare a preliminary final offer. Trimbell stated that she needed the information by the next day in order to prepare the preliminary final offer before the investigation meeting and suggested that if the information could not be provided that soon that the meeting could be postponed. At this point, Marshall Gratz of the WERC staff replaced Gallagher as Investigator. Gratz contacted Trimbell about filing a preliminary final offer and was told it would be filed by September 9, which, in fact, occurred. The investigation meeting occurred on September 15, as scheduled, and did not result on a voluntary settlement, so Gratz asked the parties to file final offers. Pursuant to the schedule established by the Investigator, the District and NESPA exchanged initial final offers on October 1 and October 8, respectively. The District field an amended final offer on October 17 and resubmitted it with clarifications on October 28 and NESPA filed an amended final offer on November 11. The District submitted another amended final offer on November 21 and NESPA responded with another final offer on December 20. The Investigator closed the investigation on January 7, 2009 and forwarded the file to the Commission. Due to a clerical error the parties did not receive a panel of arbitrators until February 25. The parties selected Arbitrator James Engmann and an interest arbitration hearing was held on May 12, 2009.

On March 16, 2009, NESPA filed a prohibited practice complaint with the WERC against the District over alleged violations of a Memorandum of Understanding relating to Food Service workers. On March 24, the District moved the WERC to consolidate that matter with the instant complaint and also sought to have the proceedings referred to grievance arbitration. The Commission denied the motions and the matter moved forward and was heard on August 5 and 6, 2009.

PARTIES' POSITIONS

Complainant

The District asserts that NESPA violated Sec. 111.70(4)(cm), Wis. Stats. by failing to file a preliminary final offer within fourteen days of its receipt of the petition for interest arbitration, and further asserts that this failure also constitutes a violation of Sec. 111.70(3)(b)3, in that such failure amounts to a refusal to bargain. It notes that dilatory tactics can be construed as a violation of the duty to meet and confer at reasonable times. CITY

OF JANESVILLE, DEC. NO. 22981-A (Honeyman, 1986). In this case, NESPA did not request an extension to file a preliminary final offer and did not file it until just before the investigation meeting, two and one-half months later. NESPA's explanation for its failure to file and unavailability to meet during July and August was that its UniServ representative, Terri Trimbell, was busy or unavailable due to work-related meetings and planned vacations. This was a blatant disregard for the law and the evidence is undisputed that the delay was economically advantageous to NESPA and disadvantageous to the District. Testimony from WEAC representative Dennis Eisenberg, who assisted Trimbell, reveals that he views the statutory requirement as a "guideline" and not as mandatory. He also testified to his own numerous scheduling conflicts during the summer of 2008, but did not explain why another staff member could not have assisted Trimbell.

There are numerous NLRB decisions that hold that a party cannot use unavailability of its representative as an excuse for failure to bargain. A party's duty of good faith includes the duty to make its representatives available at reasonable times and places for negotiations. Here, NESPA's conduct was even more egregious because it had not only a duty of good faith but also a statutory duty to file a preliminary final offer within fourteen days. The fact that its representatives were busy, or that some of the negotiating team members were school year employees, does not excuse NESPA's failure to comply with the statute.

NESPA also violated Sec. 111.70(3)(b)3 and Sec. 111.70(4) by engaging in inappropriate dilatory tactics. These include engaging in regressive bargaining, attending the June 19 bargaining session with no intention of attempting to settle, making an eleventh hour request for extensive costing information and demanding a one day turnaround under threat of cancelling the investigation meeting, filing its preliminary final offer in an untimely manner, continuing to delay through the process of exchanging final offers, filing a prohibited practice claiming the District violated the dynamic status quo to aid its position in arbitration, when it knew the memorandum in question had expired and was not part of the status quo, delaying the process through the interest arbitration to gain economic advantage, and using the delay to lobby for legislative changes to enhance its position in arbitration. As a result, NESPA should be sanctioned for its engagement in prohibited practices.

Respondent

NESPA assert that the District violated Secs. 111.70(3)(a)1 and 3, Wis. Stats. by wrongfully filing and pursuing a prohibited practice complaint in retaliation for the Association's engagement in concerted protected activity. To establish a violation, it must be shown that the complaining party 1) was engaged in lawful concerted activity, 2) that the employer was aware of such activity, 3) that the employer was hostile to such activity, and 4) that the employer took action against the employee at least in part on account of such hostility. Under Sec. 111.70(2), employees "...have the right of self-organization, the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purposes of collective

bargaining…" If the employer's action has a reasonable tendency to interfere with employees' exercise of their rights, unless it had valid reasons for its actions, the violation is established.

Here, the initial filing of the District's complaint violated the statute, as did its resurrection of the complaint after NESPA filed a complaint on an unrelated matter. The District filed its complaint because alleged delays in the bargaining process, but did not demand a hearing within 40 days, as permitted by statute, nor did it agree to conciliation. This invalidates any claim by the District that it was concerned with delay. In fact, District Human Resources Director Vicky Holt testified that the District pursued the complaint because it wanted to push NESPA to settle the contract, which constitutes an attempt to improperly influence the bargaining unit and unlawful interference. Further, in amending its complaint, it is clear that the District was not addressing any additional "foot dragging," because final offers had already been certified. Its sole purpose was to intimidate the bargaining unit members and get them to agree to its bargaining concessions. The District also used the complaint process to retaliate against NESPA for further protected concerted activity. This is shown by the fact that it amended its complaint on two occasions after NESPA engaged in protected activity – once after Terri Trimbell requested an extension to file NESPA's interest arbitration brief and once to challenge the legality of NESPA's counterclaim.

NESPA also asserts that there is no merit to the District's complaint. The District failed to introduce any evidence of improper motive, which is central to any claim of bad faith bargaining. Dennis Eisenberg testified that Trimbell was, in fact, anxious to get the case certified for arbitration. Further, there is no evidence supporting the District's claim that NESPA was delaying the bargain in order to take advantage of proposed changes in the bargaining law. Indeed, none of the proposed changes were relevant to this bargain.

Count one of the complaint must be dismissed. There is no evidence that Trimbell failed to communicate with the Investigator, as alleged. In fact, she communicated several times with the Investigator, which the Investigator told the District's counsel. The fact that the parties did not meet until September was not totally NESPA's doing, but also was partly due to the Investigator and partly due to the District's counsel, who actually suggested September dates. Further, it is not a violation for a party to not be available on dates offered by the Investigator. There is no evidence that Trimbell was available on the suggested dates and the Investigator informed the District that she could not force NESPA to meet because there was not evidence of outrageous foot dragging. There is also no evidence that a failure to file a preliminary final offer within fourteen days of the filing of the petition is a *per se* violation of Sec. 111.70. There is no authority holding that a failure to timely file a preliminary final offer constitutes a violation of Sec. 111.70(3). In cases where delay has been found to constitute bad faith, the conduct has been egregious. That was not the situation here. Trimbell made every effort to provide the preliminary final offer, but first had to consult with the WEAC Collective Bargaining Division. She was advised by Eisenberg, who, based on years of experience, told her that the parties typically regard fourteen days as a guideline rather than a requirement. While perhaps an incorrect interpretation of the law, this does not amount to bad faith. Also,

the District did not make a serious effort to obtain the offer. No demand was made to Trimbell by the District and the messages sent by the District's counsel were sent to the wrong e-mail address. Neither the Commission, nor any Wisconsin court has ever held that a failure to timely file a preliminary final offer is a *per se* violation of Sec. 111.70(3). Should the Examiner find a violation, therefore, it should be enforced prospectively because it would be a new rule of law, which would not be furthered by retroactive application.

There was also no violation when NESPA requested additional information after the petition was filed. It has been held that requests for information related to wages and benefits is presumptively relevant and the District conceded that the request was not frivolous, irrelevant, or overly burdensome. The District complained about the late date of the request, but it was important to have current information and, again, it did not overly burden the District. The allegation that NESPA threatened to cancel the investigation should also be dismissed, as there is no evidence of any such threat. Further, the District knew there was no threat, which makes its complaint an act of bad faith. The allegation that NESPA made it difficult for the District to prepare for the investigation should also be dismissed. It is disingenuous for the District to claim foul when NESPA did not file its preliminary final offer within fourteen days and then to state that NESPA's offer was nearly identical to its initial proposal.

NESPA also did not improperly delay the exchange of final offers. NESPA did not delay in amending its final offers, as is shown by the timeline chronicling the parties' exchanges. Further, the Commission has ruled that an Investigator cannot close an investigation while one party still wants to modify its offer. Here, NESPA filed a responsive offer in eighteen days, whereas the District took eleven days to file its offer. NESPA's response can hardly be said to be egregiously late. There is no evidence that NESPA had any improper motive for filing its offer late. Count five should be dismissed because there is no support for the District's claim that NESPA improperly delayed bargaining, so there is no basis to claim that NESPA used the non-existent delay to improperly argue for its position in interest arbitration. Count six should be dismissed for failure to state a claim on which relief may be granted. The District alleges that NESPA's filing of its counterclaim was a violation of Sec. 111.70(3), but fails to cite any portion of the statute that it contends was violated. As such, the claim should be dismissed.

All claims regarding alleged violations of Sec. 111.70(4)(cm)6 should be dismissed. The Commission's jurisdiction is restricted to claims arising under Sec. 111.70(3), therefore it cannot adjudicate claims based on alleged violations of Sec. 111.70(4)(cm)6. There is also no private right to relief for alleged violations of Sec. 111.70(4)(cm)6 outside the statutes existing to restrict prohibited practices. Even if the Examiner finds a violation, however, there is no basis for awarding the extraordinary relief requested by the District. The relief requested by the District, such as the right to implement its final offer, or the ability to subcontract food service work without posting, or to be awarded costs and fees for additional insurance costs, exceed the Commission's authority. They go beyond the purposes of MERA and are the more inappropriate because the District has failed to prove any bad faith on NESPA's part. On the

other hand, the District's conduct has been so egregious that an award of costs and fees to NESPA is in order.

Complainant Reply

The District asserts that NESPA's position that failure to file a preliminary final offer in a timely manner is not a *per se* violation of Sec. 111.70 has no merit in light of the clear language of Sec. 111.70(4)(cm)6a. The language of the statute is mandatory and is not waivable simply because the Association wishes it to be so. Further, NESPA's action was not a minor oversight, but a two and one-half month delay. It did not file its offer until three days prior to the investigation, even though they knew the requirements of the statute, because they deliberately chose to ignore it. The NESPA representatives also failed to make themselves available for bargaining because it interfered with their vacations and internal conferences and because they could not form a bargaining position before the calendars of three Union representatives could be coordinated to meet together, all the while the District was absorbing significant insurance costs.

NESPA blames the Investigator, the District and the anxieties of the local members for the delays in bargaining, but fails to acknowledge that it ultimately is responsible for complying with the law and bargaining in good faith. It is axiomatic that good faith bargaining requires knowledge of the other party's position, yet NESPA deliberately withheld its position until just before the investigation and then regressed to its original bargaining positions. The Association's behavior is contrary to the principles behind collective bargaining and has hindered to prospects of contract settlement, thus it has failed to bargain in good faith.

NESPA's argument that the District's complaint was filed in retaliation for its engagement in protected concerted activity is, likewise, meritless. The District was pursuing legal remedies to seek redress under the law, which it is entitled to do. Further, there is no merit to the contention that the WERC lacks jurisdiction in this case. It is granted legal power to effectuate the purposes of the statute and should take necessary action to redress the grievances of the District, including an award of attorney's fees.

Respondent Reply

The District's brief raises four new claims not mentioned in its various complaints – that NESPA engaged in regressive bargaining, that NESPA violated MERA by seeking legislative changes while engaged in bargaining, that NESPA acted in bad faith by filing a prohibited practice complaint against the District and that NESPA violated Secs. 111.70(4) and 111.70(4)(c). The Commission has held that parties may not amend their pleadings in their post-hearing briefs. Further, the statute of limitations had run on such claims by the time the briefs were filed, so they should not be considered. Not only that, but there is no evidence in the record supporting those claims. There is no evidence of regressive bargaining or unwillingness to settle, there is no support for the argument that seeking legislative changes is

a violation of the law, there is no allegation in any of the pleadings that NESPA's separate complaint against the District was done in bad faith, and the District's new allegations regarding alleged violations of Sec. 111.70(4)(c) are not relevant to this proceeding.

There is no evidence that NESPA's failure to file its preliminary offer within fourteen days in any way hindered the District in preparing for the investigation. This is an especially specious claim when the District claims in the same breath that the Union engaged in regressive bargaining by returning to its original positions. The District cannot have it both ways. Further, NESPA did not unlawfully delay the bargaining process. It needs to be reiterated that these are school district employees, most of whom work during the school year. It is not unusual for them to be unavailable during the summers making it hard to schedule meetings. This must be considered when evaluating the length of time it took to schedule the investigation. The District has made misrepresentations of fact and committed gross exaggerations in characterizing NESPA's conduct. There is no evidence that NESPA refused to file a preliminary final offer and, on the other hand, there is also no evidence that the District made much effort to obtain the offer, which you would expect if it was such an important concern. Further, the District's reliance on NLRB cases is inapposite and the cases cited reveal that the Board also reviews the totality of the conduct when deciding on allegations of bad faith. The bad faith here was on the District in bringing frivolous claims and merits an award of attorney's fees.

DISCUSSION

The District's Second Amended Complaint in this matter lists six separate counts of alleged prohibited practices by NESPA Within those counts it cites numerous forms of conduct which it argues constitute bad faith bargaining, contrary to Sec. 111.70(3)(b)(3), Wis. Stats. These include failure to communicate with the Investigator and failure to make itself available for investigation, failure to file a preliminary final offer in a timely manner, making an untimely request for information and threatening to cancel the investigation if it was not provided, intentionally delaying the exchange of final offers and arguing to the interest arbitrator that NESPA's offer should be selected, in part, because the delay in the process would make selection of the District's offer inequitable. The District further asserts that NESPA's failure to file a preliminary final offer within fourteen days of receipt of the interest arbitration petition constitutes a separate violation of Sec. 111.70(4)(cm)6, Wis. Stats. Finally, the District asserts that NESPA's Counterclaim against the District in this matter should be dismissed as it was filed in retaliation for the District's lawful action of filing its original Complaint and Amended Complaint. NESPA's Counterclaim in this matter asserts that the District's filing of the Complaint and Amended Complaint in this matter, and its effort to have the Complaint consolidated with a separate Complaint filed against the District by NESPA, were acts of retaliation, motivated in part by hostility toward NESPA's protected concerted activity, contrary to Sec. 111.70(3)(a)1 and 3, Wis. Stats.

Legal Framework

Sec. 111.70(3)(b)3 states, as follows:

> (b) It is a prohibited practice for a municipal employee, individually, or in concert with others:
>
> . . .
>
> 3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or exclusive collective bargaining representative of employees in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

It has been held that inordinate delay in advancing the bargaining process by a municipal employer can be held to be a refusal to bargain under Sec. 111.70(3)(a)4, Wis. Stats. Good faith is to be determined, however, by the totality of the party's conduct. CITY OF JANESVILLE, DEC. NO. 22981-A (Honeyman, 3//28/86). The corollary to Sec. 111.70(3)(a)4 applicable to labor organizations is Sec. 111.70(3)(b)3, cited above.

Sec. 111.70(4)(cm)6.a states, as follows:

> 6. 'Interest arbitration.' a. If in any collective bargaining unit a dispute relating to one or more issues has not been settled after a reasonable period of negotiation and after mediation by the commission under subd. 3 and other settlement procedures, if any, established by the parties have been exhausted, and the parties are deadlocked with respect to any dispute between them over wages, hours and conditions of employment to be included in a new collective bargaining agreement, either party, or the parties jointly, may petition the commission, in writing, to initiate compulsory, final and binding arbitration, as provided in this paragraph. At the time the petition is filed, the petitioning party shall submit in writing to the other party and the commission its preliminary final offer containing its latest proposals on all issues in dispute. Within 14 calendar days after the date of that submission, the other party shall submit in writing its preliminary final offer on all disputed issues to the petitioning party and the commission. If a petition is filed jointly, both parties shall exchange their preliminary final offers in writing and submit copies to the commission at the time the petition is filed.

With respect to the allegations of the complaint, it is the Complainant's burden to establish the elements of its claims by a clear and satisfactory preponderance of the evidence. WEST ALLIS – WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO 20922-D (Schiavoni, 10/84). Likewise, the Respondent bears a commensurate burden to establish the elements of its counterclaim.

Failure to Bargain in Good Faith

The District asserts that in several respects NESPA failed to bargain in good faith after the petition for interest arbitration was filed. The various allegation of bad faith bargaining are, as follows:

1) That NESPA failed to communicate with the Investigator and failed to make itself available for investigation in a timely manner;

2) That after the interest arbitration petition was filed on June 20, 2008, NESPA did not file a preliminary final offer until September 9, 2008, six days before the investigation meeting;

3) That NESPA made an untimely and extensive request for information from the District on September 4, 2008 and threatened to cancel the investigation if it was not provided within twenty-four hours;

4) That after the investigation meeting on September 15, 2008, NESPA unduly delayed the process of exchanging final offers, thereby extending the time before the case could be closed and processed to arbitration; and

5) That in the arbitration, and in its subsequent arguments, NESPA maintained that its final offer should be accepted, in part, due to the delay in the process. [1]

The record reveals that after Investigator Gallagher was appointed she made contact with the representatives of the parties regarding dates for the investigation. She contacted the District in early July and it indicated availability during the months of July and August. Gallagher also contacted NESPA's representative, Terri Trimbell, who indicated that the NESPA team could not meet during July due to a previously scheduled vacation and other work-related commitments. Thereafter Gallagher did not follow up with Trimbell until late

[1] In its brief, the District raises other claims against NESPA, including that NESPA had engaged in regressive bargaining prior to the filing of the interest arbitration petition and had no intention of settling the contract and that NESPA deliberately delayed negotiations while it was lobbying for legislative changes that would improve its position in arbitration. These allegations were not raised in the second amended complaint, nor did the District move to amend the pleadings, therefore these allegations are not timely and will not be considered.

July. On July 30, Gallagher had phone conversations with Trimbell wherein she indicated the District had proffered August 18 and 25 as potential dates and Trimbell indicated that the dates were not available for her team. She, in turn, offered numerous dates in September. On August 5, the parties agreed to an investigation date of September 15. During this period, the District's representative, Attorney James Macy, expressed his frustration to Gallagher, but Gallagher acknowledged that the delay was, at least in part, due to her failure to follow up with Trimbell. The District points out that it made contact with NESPA's local president in July to try to schedule the investigation, but was unsuccessful due to Trimbell's unavailability. The District did not contact Trimbell directly, however, even though it knew she was NESPA's UniServ Director and had her contact information. To some degree, therefore, the District is also partially responsible for the delay by choosing to communicate through the local officers rather than directly with NESPA's bargaining representative.

The District argues that it was bad faith for NESPA to fail to make itself available for investigation in July, despite Trimbell's scheduling conflicts. The record does not indicate, however, that Trimbell's vacation or conferences were scheduled after the District offered July dates so, for the purposes of this inquiry, it is assumed that they were not. The contention must be, therefore, that once the interest arbitration petition was filed, it was bad faith for Trimbell to either not clear her calendar for the summer or to arrange for another representative for the investigation. It does not appear, however, that, despite its inquiries to the local president, the District indicated any real urgency for a quick meeting, even to the Investigator, hence she did not pursue the matter more insistently with NESPA until August. Therefore, there would have been no reason for Trimbell to believe she needed to rearrange her schedule or find substitute representation. By the time Gallagher was able to contact Trimbell, two available dates had been put forward for August, neither of which was available for the entire NESPA bargaining team, and in particular for the WEAC negotiations consultant, Dennis Eisenberg, so September dates were suggested and agreed upon. The District argues that NESPA should have arranged for other representation in Trimbell's absence, but there is no evidence in the record that it is common practice for parties operating under MERA to do so, and certainly no cited WERC authority to the effect that such is required under Sec. 111.70(3)(b)3. Taking all these various factors into consideration, therefore, I do not find that the delay in scheduling the investigation was entirely NESPA's fault, nor that the delay was the result of bad faith on NESPA's part.

The next allegation is that NESPA engaged in bad faith bargaining by failing to file a preliminary final offer until six days before the investigation meeting, nearly two and one-half months after the filing of the interest arbitration petition. Here, the District relies on Sec. 111.70(4)(cm)6, Stats., which mandates that once a petition is filed the responding party must file a responsive preliminary final offer within fourteen days. The District contends that such failure is a *per se* act of bad faith and, as such, constitutes a violation of Sec. 111.70(3)(b)3. I disagree. As NESPA points out, there is no cited authority holding that a failure to timely file a preliminary final offer is, in and of itself, bad faith bargaining and there are numerous reasons why a preliminary final offer would not be filed on time that would not amount to bad faith. Indeed, the very fact that parties have traditionally taken a rather casual

view of the statute without consequence would suggest that the more likely explanation would be not bad faith, but rather an expectation that strict observance of the statute was neither expected nor required. I am not prepared to find, therefore, that NESPA's failure to file a preliminary final offer within fourteen days was, in and of itself, an act of bad faith.

I am mindful, however, that inordinately dilatory conduct may ultimately constitute bad faith bargaining. CITY OF JANESVILLE, *supra*. Here, NESPA failed to file a preliminary final offer for two and one-half months. If the District had not pressed the issue this would not necessarily have been problematic, but the record is clear that the District did raise the issue repeatedly. True, the District did not initially directly approach Trimbell about this, and inquiries were made instead to the local president. Steve Prosek. Prosek testified, however, that NESPA was anxious to advance negotiations, so one assumes that the local forwarded these requests to Trimbell, and, if not, it should have. Despite the fact that e-mails for Trimbell were initially sent to an incorrect address, there is no apparent reason that she should not have known, nor is there evidence that she did not know, that the District was anxious to receive NESPA's preliminary final offer. Under the circumstances, therefore, even given Trimbell's stated need to consult with the WEAC bargaining consultants, there is no legitimate reason that NESPA could not have supplied a preliminary final offer in less than two and one-half months. Whereas, it may be difficult to find a particular day for a meeting over an extended period, due to scheduling conflicts and the number of persons' calendars which must be coordinated, the same considerations do not apply to the need to find time to develop a preliminary final offer. In CITY OF JANESVILLE, the Examiner found bad faith where an employer did not provide bargaining proposals for two months. That NESPA ignored the District's requests for a preliminary final offer for two and one-half months, and only ultimately provided its offer on the eve of the investigation, seems to me to come within the definition of inordinate delay, and I so find.

The District also asserts that NESPA made an untimely request for information and threatened to cancel the investigation if it was not provided. This stems from the fact that Trimbell contacted Paul Hauffe in the District business office on Thursday, September 4, 2008, one day after the District had filed the original complaint in this matter, and requested that he provide NESPA with wage and benefit information for all bargaining unit members by the next day and suggested that if the information was not provided it might be necessary to reschedule the investigation because NESPA would not have enough time to prepare its preliminary final offer. There are two separate contentions here. First, that NESPA made an untimely request for information in order to excuse its failure to file a timely preliminary final offer. Second, that NESPA threatened to cancel the investigation unless its demands were met, which was further evidence of bad faith.

With respect to the first contention, the District first asserts that NESPA's information request was untimely, but cites no statutory or case law authority supporting its claim. Nothing in Sec. 111.70 establishes a deadline for requesting documents or other information prior to an interest arbitration investigation. Further, no case cited by the District establishes such a

deadline or sets forth criteria for determining one. In my view, therefore, there is no bright line rule as to when or if an information request is untimely and so making such a request eleven days before the investigation is not untimely *per se*. There is also no evidence that Trimbell's request was motivated by a desire to excuse NESPA's failure to file a timely preliminary final offer. The District argues that Trimbell did not deny knowledge of the District's complaint when she filed her request, but failure to deny lack of knowledge is not the same as proof of knowledge, and Trimbell did not testify in the proceeding, so I do not find that NESPA's information request was an act of bad faith.

As to the contention that NESPA threatened to cancel the investigation if the information was not provided within one day, I also am not persuaded that NESPA acted in bad faith. The pertinent language of Trimbel's September 4th message to Hauffe states: "As stated earlier, we have asked for the base salary information before and without the data it may be necessary to reschedule the mediation/arbitration on September 15th." District Human Resources Director Vicky Holt responded the next day, in pertinent part, as follows: "Please note that we will consider any further delay in this process by the Association, including threats to cancel the scheduled investigation, as further violations of law." Trimbell replied to Holt, in part, as follows: "…we have no intentions to cancel the scheduled mediation date. I only offered that as a suggestion should the District need more time upon receiving our preliminary final offer." Standing alone, Trimbell's initial message could be construed to mean that NESPA would cancel the investigation if the information was not provided as requested. Her response to Holt on September 5, however, indicates that her suggestion in her first message merely anticipated the possibility that the District would need to reschedule if a delay in providing the information in turn delayed the filing of NESPA's preliminary final offer. One may question Trimbell's sincerity, but the fact that the second message was sent before the information was provided supports a finding that the initial request was not intended as a threat. In any event, there is not proof of bad faith on this basis by a clear and satisfactory preponderance of the evidence.

The District's next contention is that NESPA unduly delayed the process of exchanging final offers after the investigation meeting, again in order to extend the length of the case. Here, the Investigator, Marshall Gratz, who had replaced Sharon Gallagher just prior to the investigation meeting, set a schedule for the initial exchange calling for the District to file its final offer on or before October 1 and NESPA to file its final offer on or before October 8. The District had sought a quicker exchange, but NESPA indicated it needed more time. Both parties filed their final offers on the specified dates. Thereafter, the District filed an amended final offer on October 17, which it clarified on October 28, after an inquiry by NESPA. NESPA responded on November 11. The District filed another amended offer on November 21 which was substantially the same as its October 28 offer, to which NESPA's bargaining consultant, Dennis Eisenberg, indicated NESPA would have a response some time after Thanksgiving. On December 10, Trimbell notified Gratz that NESPA would be filing another amended offer, but that it had been delayed by a funeral in her family. Ultimately, NESPA filed its amended offer on December 20, whereupon the investigation was closed.

The District's frustration with the length of this process is palpable, and understandable, given that it was already concerned about the length of time it took to schedule the investigation. Nevertheless, here again there is not sufficient evidence of a pattern of calculated delay, nor inordinate delay, such that I can make a finding of bad faith. The exchanges appear to have progressed at a reasonable pace up to the filing of the District's offer on November 21. Thereafter, NESPA did not respond until December 20. Admittedly, a month is a fairly long time for response, especially since the District's November 21 offer did not significantly differ from its previous offer. The District's offer was sent just before the Thanksgiving break, however, making it difficult for the NESPA team to meet and confer immediately. Then, after the break the death in Trimbell's family further hampered NESPA's ability to meet. Given these intervening events, the evidence does not support a finding that NESPA deliberately delayed the exchange process, nor that the delay in exchanging offers was so inordinate that a finding of bad faith is warranted.

The District further contends that NESPA acted in bad faith in arguing during and after the interest arbitration proceeding that the length of time involved in the case made its offer the more reasonable. The presumption underlying this assertion is that NESPA deliberately delayed the proceedings in order that it could later use the passage of time as an argument in its favor due to the harsh effect of retroactive application of the District's proposals. Having found, however, that NESPA did not act in bad faith with regard to scheduling the investigation or exchanging final offers, I do not find that NESPA acted in bad faith in asserting that the passage of time was a factor in its favor in evaluating the respective final offers. The failure to file a preliminary final offer in a timely fashion, in and of itself, did not extend the length of the case and, therefore, is irrelevant to the arguments before the interest arbitrator. Thus, while the argument may indicate some audacity under the circumstances, it is not evidence of bad faith.

Sec. 111.70(4)(cm)6

The District asserts a separate claim against NESPA based on an alleged violation of Sec. 111.70(4)(cm)6, Wis. Stats. As set forth above, Sec. 111.70(4)(cm)6 requires that upon the filing of a petition for interest arbitration the other party must file a responsive preliminary final offer within fourteen days. There is no dispute that NESPA did not file a preliminary final offer until two and one-half months after the filing of the petition. NESPA asserts that Sec. 111.70(4)(cm)6 is not independently enforceable via a prohibited practice complaint. In the alternative, it argues that the filing deadline is not mandatory, but is to be regarded as a guideline.

The pertinent language of the statute is: "Within 14 calendar days after the date of that submission (the petitioner's preliminary final offer), the other party shall submit in writing its preliminary final offer on all disputed issues to the petitioning party and the commission." The word "shall" establishes that the language of the statute is not advisory. Once a petition for interest arbitration is filed the responding party must file a preliminary final offer within

fourteen days in order to be in compliance. Thus, NESPA is incorrect in asserting that fourteen days is a guideline rather than a deadline. NESPA did not file its offer within fourteen days and, therefore, failed to comply with the statute. Having so said, the question remains whether failure to comply with Sec. 111.70(4)(cm)6 constitutes a prohibited practice under Sec. 111.70(3)(b)3 *per se*. I find that it does not. As noted above, under certain circumstances failure to timely file a preliminary final offer may constitute bad faith, but only where the totality of the conduct can be construed as a refusal to bargain. Nothing in the wording of Sec. 111.70(3)(b)3 suggests that a late filing of a preliminary final offer, in and of itself, constitutes a prohibited practice. Under Sec. 111.70(4)(cm)6, therefore, if a party objects to a failure to file a preliminary final offer, they must seek recourse from the Investigator or the Commission within the interest arbitration proceeding.

NESPA's Counterclaim

NESPA asserts that the District's conduct in filing the initial complaint, as well as the amended complaint, seeking to have the complaint consolidated with a separate complaint filed by NESPA and refusing Trimbell's request for an extension in filing NESPA's interest arbitration brief violated Sec. 111.70(3)(a)3 and 1, Wis. Stats. NESPA contends that the District's actions were in retaliation for NESPA's engaging in protected concerted activity in the conduct of the interest arbitration proceeding, as well as in filing a separate prohibited practice complaint against the District. NESPA asserts that it was engaged in lawful concerted activity, that the District was aware of such activity, that the District was hostile to NESPA's lawful concerted activity and that its actions listed above were in part motivated by that hostility. Based on the test set forth in CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), NESPA maintains that it has established the elements to find unlawful retaliatory conduct. I disagree.

The District filed its original complaint on September 3, 2008, as a result of what it considered to be bad faith bargaining on NESPA's part based on allegations of undue delay in scheduling the investigation and filing its preliminary final offer. As noted above, NESPA's failure to file its preliminary final offer for two and one-half months did constitute inordinate delay which was tantamount to a failure of its duty to bargain. It was not, therefore, lawful concerted activity and the District was within its rights to file the complaint.

The District's motion to consolidate was filed subsequent to NESPA's filing a separate complaint against the District in March 2009, alleging the violation of a memorandum of understanding covering Food Service Workers. NESPA's contention is apparently that the District's complaint was dormant and likely to be dismissed until NESPA filed its complaint, and the District only revived the complaint in retaliation for NESPA's complaint. In short, there is little in the record to support this contention. To suggest that the complaint was revived due to NESPA's action assumes that the District was not otherwise planning to pursue the complaint. However, there is no evidence that the District intended to dismiss its complaint at any time. It is equally possible to assume that the District's motion was merely intended to expedite both matters.

The amended complaint was filed after the interest arbitration proceeding and added allegations based on undue delay in exchanging final offers and processing the case to arbitration, and then arguing to the interest arbitrator that the delay supported NESPA's position. Given the District's theory of the case, however, that NESPA was attempting to delay the process at every stage in order to extend the time before a decision was issued, it does not appear unreasonable that the District would consider other instances of apparent delay to be part of the same course of conduct and incorporate them into its pleadings. Here, again, there is no evidence of intent to retaliate. The fact that the additional allegations contained in the amended complaint were not deemed established does not mean they were brought in bad faith. MERA establishes the right to file a prohibited practice complaint. The allegations of the complaint, if proven, would arguably constitute prohibited practices. Absent clear and convincing evidence that the District's motive was retaliation for lawful concerted activity, therefore, NESPA has failed to establish its claim.

Finally, NESPA's assertion that the District's objection to an extension for filing briefs constituted retaliatory conduct has not been established. There is nothing in Sec. 111.70 that preserves a right to extensions in filing briefs. These are informal courtesies extended by and between advocates and, when not extended, may be granted by the arbitrator. The fact that a party would not agree to an extension, in and of itself, does not establish retaliatory conduct. Here, however, the District's advocate made it clear that the District's reasons were because of the amount of time the case had already taken. Consistently throughout this case the District has complained about the delays in the process due to the implications for its budget. It is hardly surprising, therefore, that the District would object to an extension of the briefing schedule. Thus, assuming *arguendo* that asking for a brief extension constitutes protected concerted activity, there is direct evidence here of a legitimate reason for denying the request and only inferential evidence of possible retaliatory motive. I find, therefore, that NESPA has failed to meet its burden as to this allegation. The counterclaim is, therefore, dismissed.

Dated at Fond du Lac, Wisconsin, this 27th day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

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