STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CAMPBELLSPORT EDUCATION ASSOCIATION, Complainant,

vs.

CAMPBELLSPORT BOARD OF EDUCATION and CAMPBELLSPORT SCHOOL DISTRICT, Respondents.

Case 28
No. 70200
MP-4620

Decision No. 33168-B

Appearances:

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

Michael Cieslewicz, Kasdorf, Lewis and Swietlik, Attorneys at Law, One Park Plaza, 11270 West Park Place, Fifth Floor, Milwaukee, Wisconsin 53224, and **Tony J. Renning**, Davis & Kuelthau, S.C., 219 Washington Avenue, Suite 200, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Campbellsport Board of Education and Campbellsport School District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On April 12, 2011, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded that the Respondents Campbellsport Board of Education (Board) and Campbellsport School District (District) had engaged in bad faith bargaining in violation of § 111.70(3)(6)4 and § 111.70(3)(a)1, Stats. A timely petition for review was filed with the Wisconsin Employment Relations Commission pursuant to § 111.70(4)(a) and 111.07(5), Stats. The parties submitted written argument in support of their positions, the last of which was received on July 1, 2011.

Having reviewed the record and being fully advised of the positions of the parties, the Commission makes and issues the following

ORDER

A. Examiner's Findings of Fact 1, 3 and 4, are affirmed.

B. Examiner's Findings 2 and 5-21 are set aside and the following findings are made.

2. The Campbellsport School District, hereinafter referred to as the District, is a municipal employer which operates a public school system in Campbellsport, Wisconsin. Its offices are located at 114 West Sheboygan Street, Campbellsport, Wisconsin.

. . .

5. Prior to the filing of the grievance giving rise to this claim, all previous Step 3 grievance meetings have been held in closed session.

6. Step 3 grievance discussions have occurred at both regular and special School Board meetings.

7. In the late spring or early summer of 2010, the Association learned that the District intended to unilaterally change the health insurance carrier from the WEA Trust to the WCA Group Health Trust.

8. The Association filed a grievance alleging that the unilateral change violated the collective bargaining agreement.

9. The District subsequently made the change in carriers.

10. The District, through its legal counsel, proposed waiving steps 2 and 3 of the grievance procedure and proceeding directly to arbitration.

11. The Association offered to waive Step 2 but not Step 3, indicating that it wanted to meet with the School Board to discuss the grievance. The parties agreed to discuss the grievance at a School Board meeting on August 9, 2010.

12. Prior to the meeting, the Board posted the meeting notice pursuant to § 19.84, Stats. The notice indicated that the Board was going to hear a grievance and then adjourn into closed session to take action on the grievance and then as required by law return into open session to announce its decision. The notice was posted on the Board's website and made available to two area newspapers.

13. The Association's first actual notice that the Board intended to discuss the grievance in open session occurred when their representative arrived at the August 9th meeting.

14. The Association objected to holding the discussion in open session, asserting that it intended to provide "testimony" from an individual member and supporting medical records. The District took the position that, because the underlying issue involved a matter of great public impact, the discussion should be held in open session. Ultimately the Association refused to proceed in open session.

15. The Board went into closed session to deliberate. They returned to open session and voted to deny the grievance.

16. The Association advanced the grievance to arbitration, which is Step 4 in the grievance procedure. The District did not object to the submission of the matter to arbitration.

B. The Examiner's Conclusions of Law are set aside. The following Conclusion of Law is made:

Respondents did not engage in bad faith bargaining in violation of § 111.70(3)(a)4 and 111.70(3)(a)1, Stats., when they attempted on this single occasion to conduct a third Step grievance discussion in an open meeting, since the Association could and did choose to forego Step 3 and proceed to arbitration on the merits of the grievance, and thus suffered no cognizable harm.

C. The Examiner's Order is set aside. The following Order is made:

The complaint of the Campbellsport Education Association is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith M. Neumann /s/
Judith M. Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

CAMPBELLSPORT SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING
ORDER ON REVIEW OF EXAMINER'S DECISION**

This case presents the question of whether a school board, designated as the third step in a four step grievance process, engaged in bad faith bargaining when it insisted on hearing a grievance at the third step of the grievance procedure in public session on an isolated occasion, where the Association could refuse to participate in that public session without losing its opportunity to have the merits of the grievance decided in arbitration.

The District's decision to unilaterally change the insurance carrier from the WEA Trust to an alternative provider was the subject of the underlying grievance. The financial savings to the District were purportedly significant and, on that basis, the Board believed the matter to be of significant interest to the public. The Association refused to proceed in open session, and the matter was advanced to the final step of arbitration. The parties had agreed to waive steps one and two in the process and ultimately no objection was made to the matter proceeding to arbitration. The record is silent as to whether the matter proceeded to arbitration.

The Examiner concluded that the District engaged in a prohibited practice when it insisted on conducting the third step grievance discussion in open session. We now set aside the Examiner's decision and conclude that in these circumstances the District's decision to hear the grievance at the third step in open session before the School Board was not bad faith bargaining. Instead, we conclude that the failure of an employer on a single occasion to conduct one non-final step in the grievance procedure is not a refusal to bargain, where, as here, the Association could forward the matter to arbitration on the merits without prejudice and where an alleged failure to comply with the contractual grievance procedure is itself a matter than can be addressed in that procedure.

Assuming, as the Association asserts and the Examiner found, that the District's insistence on conducting the third step grievance hearing in public session was tantamount to a refusal to participate in the third step of the procedure, such a refusal is at worst a harmless error in a situation like the instant one. MERA, as it existed when this matter arose, did not require parties to include a grievance procedure as such in their collective bargaining agreements nor prescribe the form or steps that such a process should take. Generally speaking, the existence of and the protocols for a contractual grievance procedure are mandatory subjects of bargaining. RACINE UNIFIED SCHOOL DIST., DEC. NO. 11315-D (WERC, 4/74). If, as is usually the case, the parties have a contractual grievance procedure, certainly an outright refusal to process a grievance may constitute a prohibited practice, particularly if such refusal impedes access to the arbitration process. See WAUPACA COUNTY, DEC. NO. 32001-B (WERC, 11/07). Since a grievance procedure typically provides a forum for resolving disputes without the time and expense of arbitration, it is also arguable that a

routine or regular refusal to hear grievances prior to arbitration and/or to participate in the preliminary steps of the grievance procedure could rise to the level of bad faith bargaining even if arbitration is available as to the merits.

Here, however, the Board's "refusal" to hear the grievance (by imposing a condition that the Association found unacceptable), was not part of a pattern or practice of refusing to participate in the preliminary steps of the grievance procedure and thereby forcing the Association to take every grievance to arbitration. This was a single instance, based on the Board's views about the nature of this particular grievance and the likelihood that arbitration could not in any event be avoided. In choosing this tack, the District lost the opportunity to hear the Association's best arguments before arbitration. Given the lack of discovery in the typical grievance arbitration proceeding, it strikes us that this "head in the sand" approach may not have been the wisest strategy, even if the District believed settlement prospects were poor. However, given the solitariness of the incident and the lack of any impediment to further processing the matter, we view this as a situation of "no harm, no foul," and conclude that it does not rise to a violation of the law.

Buttressing our conclusion is the fact that, if the Association believed the District's action violated the contractual grievance procedure, the Association could address that claim through the grievance procedure itself. In this case, for example, the Association might believe that the Board had made a contractual commitment to hear the grievance at Step 3 and that, by custom and practice, such meetings should be in private session. Such an argument depends upon interpreting the contract, something we traditionally avoid where the parties have a procedure in place to address a matter, to which we customarily defer.[1] BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83).

Dated at Madison, Wisconsin this 17th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith M. Neumann /s/
Judith M. Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

[1] Although this situation arose during a hiatus between collective bargaining agreements, MERA, as it existed at that time, required parties to adhere to the grievance arbitration procedure in the expired contract during any such hiatus between agreements. § 111.70(3)(a)8, Stats., and § 111.70(3)(b)7, Stats. (09-10).

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