STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVENS POINT AREA EDUCATION ASSOCIATION, Complainant,

vs.

STEVENS POINT AREA PUBLIC SCHOOL DISTRICT and ATTILA WENINGER, Superintendent, Respondents.

Case 102
No. 72219
MP- 4769

DECISION NO. 34705-B

Appearances:

Attorney Randall R. Garczynski, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin, appearing on behalf of the Complainant Stevens Point Area Education Association.

Attorney Shana R. Lewis, Davis & Kuelthau, S.C., Ten East Doty, Suite 401, Madison, Wisconsin, appearing on behalf of Stevens Point Area Public School District and Superintendent Attila Weninger.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 13, 2013, Complainant Stevens Point Area Education Association filed a prohibited practices complaint with the Wisconsin Employment Relations Commission alleging that the Stevens Point Area Public School District and Superintendent Atilla Weninger had violated §§ 111.70(3)(a)1 and 4, Stats., by failing to bargain in good faith when they entered into negotiations with Complainant with a predetermined base wage increase. Complainant further asserts Respondents' actions interfered with, restrained, or coerced Complainant in the exercise of its rights.

On January 15, 2014, Respondents filed their answer and motion to dismiss the prohibited practice complaint asserting it failed to state a cause of action and that the Respondents had bargained in good faith. On January 30, 2014, Complainant filed a written response. On February 4, 2014, the Respondents notified the examiner they did not intend to respond to Complainant's arguments.

On March 10, 2014, the Commission authorized Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order in the matter and on March 13, 2014, Respondents' motion to dismiss was denied.

Hearing on the complaint was convened on April 9, 2014, in Stevens Point, Wisconsin. Complainant and Respondents filed post-hearing briefs and reply briefs, the last of which was received by July 15, 2014, whereupon the record was closed.

Having reviewed the record and being fully advised in the premises, the examiner makes and issues the following:

FINDINGS OF FACT

1. Complainant Stevens Point Area Education Association (hereinafter "Association") is a labor organization within the meaning of § 111.70(1)(h), Stats.

2. Respondent Stevens Point Area Public School District (hereinafter "District") is a municipal employer within the meaning of § 111.70(1)(g), Stats. At all times relevant herein, the District bargaining committee included Superintendent Atilla J. Weninger, Director of Business Tom Owens, Director of Human Resources Keith Williams, and Board of Education members Chris Scott and Bob Larson.

3. Respondent Attila J. Weninger (hereinafter "Weninger") is the Superintendent for the District and has held this position since August 2010. For purposes of collective bargaining, Weninger serves as the District's lead negotiator with assistance from legal counsel.

4. The District and the Association were parties to a series of collective bargaining agreements containing provisions addressing wages, hours and conditions of employment. In anticipation of the expiration of the 2009 – 2011 collective bargaining agreement, the Association notified the District in February 2011 of its intent to bargain a successor agreement.

5. On June 2, 2011, the District and the Association exchanged initial proposals for the successor to the 2009 – 2011 collective bargaining agreement. The parties' proposals covered a full spectrum of wages, hours and working conditions. The Association offered a number of concessions including a zero percent total base wage proposal in order to reach an agreement before the effective date of 2011 Wisconsin Act 10. Ultimately, the parties were unable to reach a voluntary agreement.

6. Between June 2, 2011 and April 2012, the parties did not engage in collective bargaining.

7. On May 29, 2012, the District and the Teamsters General Union Local 662 (hereinafter "Teamsters") reached a tentative agreement which included a zero percent total base wage increase. The Teamsters represent the school bus drivers, maintenance mechanics, and

transportation secretary employed by the District. The tentative agreement was ratified by the District Board of Education on September 10, 2012, and signed by Teamster Business Agent Mitch Perkl on October 24, 2012.

8. On August 23, 2012, the District and the Association met for the purposes of collective bargaining. The District offered a total base wage increase of zero percent distributed consistent with ERC 90 and proposed that the following serve as the entirety of their collective bargaining agreement:

RECOGNITION

> WHEREAS, the Board has recognized the Association as the exclusive bargaining representative for all regular full-time and regular part-time certified teaching personnel including classroom teachers, special teachers, guidance counselors, social workers, librarians, and permanent substitutes, with the following categories of employees specifically excluded from the bargaining unit:
>
> 1. Superintendent, Principals, Assistant Principals, Assistant Superintendent – Business Affairs, Director of Human Resources, Assistant Superintendent – Curriculum and Instruction, and Assistant Superintendent Special Education / Pupil Services;
>
> 2. [N]oninstructional personnel, not required to hold valid teaching certificates, such as nurses, office, clerical, maintenance and operating employees, and educational assistants;
>
> 3. Psychologists and other certified personnel, such as coordinators and coordinating teachers, if their primary responsibility is carrying out administrative functions;
>
> 4. [S]ubstitute teachers; and
>
> 5. [A]ny employee hired for less than one semester.

DURATION

> This Agreement shall be binding and in force and effect from July 1, 2011, through June 30, 2012.

WAGES

> The amount to be distributed to the employees in this bargaining unit as an increase to base wages for the 2011 – 2012 contract year shall be $0.
>
> **MISCELLANEOUS**
>
> This Agreement was negotiated pursuant to the Municipal Employment Relations Act (MERA), as revised, and applicable administrative regulations. It is intended to conform to state laws and regulations, including MERA and applicable administrative regulations. In the event that any provision of this Agreement is contrary to law, then such provision shall not be applicable, performed, or enforced, except to the extent permitted by law; however, the remaining provisions shall continue to be in effect. Furthermore, this Agreement is the complete agreement between the parties and supersedes and replaces all agreements between the parties.
>
> * * *

9. At the same August 23, 2012 negotiating session, the Association proposed a 1.64 percent total base wage increase. The parties did not reach a voluntary settlement.

10. On October 16, 2012, the Association and District met for the purposes of bargaining the 2011 – 2012 school year. The District first offered a 0.5 percent total base wage increase accompanied by savings clause language that would prohibit the Association from returning to the bargaining table if the Wisconsin Supreme Court declared Act 10 unconstitutional. The Association proposed a 1.4 percent total base wage increase with no savings clause. The District increased its offer to a 1 percent total base wage increase along with the savings clause. The parties were unable to reach a voluntary agreement.

11. After October 16, 2012, but before July 8, 2013, the District awarded all District full-time employees, including the Association membership, that were returning for the 2012 – 2013 school year a supplemental payment in the amount of $588. The District awarded returning part-time employees a proportionate payment based on their full-time status. The District and the Association did not bargain this payment, although it was brought to the Association's attention during collective bargaining.

12. The Association and the District met on July 8, 2013, for the purpose of bargaining. The District offered a zero percent total base wage increase for the 2011 – 2012 school year. The District offered a second one-year contract, the previously proposed savings clause and a 1 percent total base wage increase for the 2012 – 2013 school year. The Association proposed a 1 percent total base wage increase for the 2011 – 2012 school year and the following language:

> In the event that Judge Colas' decision involving the constitutionality of 2011 Wisconsin Act 10 and / or Wisconsin Act 32 is not stayed by the circuit court or an appellate court or in the event said decision is upheld by an appellate court, the Association reserves the right to bargain wages, hours and working conditions covering bargaining unit employees for the 2011 – 2012 school year.

The parties did not reach a voluntary agreement.

13. On July 9, 2013, the Association and District met for the purpose of bargaining. The Association resubmitted a 1 percent total base wage increase and dropped its language proposal as referenced in Finding of Fact No. 12. The District reoffered a zero percent total base wage increase for the 2011 – 2 012 school year, increased its wage proposal for the 2012 – 2013 school year to 2 percent, and dropped its savings clause proposal. The parties were unable to reach a voluntary agreement.

14. During the July 9, 2013 public bargaining session, Weninger explained that the District would not increase its total base wage proposal to the Association because the District had made a "commitment" to zero percent base wage rates for the 2011 – 2012 school year with the Teamsters.

15. On July 16, 2013, Weninger directed an email to the Association bargaining team members which read:

> Dear SPAEA Negotiations Team,
>
> On behalf of the Board of Education and the District Negotiating Team that met with you July 8th and 9th, we'd like to offer an apology, explanation, and invitation. We are sincerely sorry that the negotiations frustrated your team, and apologize for not communicating our intentions regarding 2011–2012 and 2012-2013 ahead of time. Our intent was not to frustrate you, but to bring these negotiations to a respectful conclusion, and put dollars in the hands of your members.
>
> It was and remains the intent of both the Board and the Negotiating Team to come to the table with an offer that was respectful, fair, and fiscally responsible to everyone we represent.
>
> We respectfully ask that you consider meeting again to bargain and to seek permission from your membership to bargain the 2011–2012 and 2012–2013 contracts together, and know in advance that we are trying to respect an agreement (sic) the Teamsters, and

> make a fair and realistic way for the teachers in our District to be compensated for the work they have done.
>
> We understand that we are in the middle of the summer, so we would be interested in knowing how much time you may need in order to consider our request and be able to get back to us with a response. If you could let us know where you stand on or before August 1, 2013, we would appreciate it. Again, our intent is to respect both of our time and efforts as valuable and important for all involved.
>
> Thank you for your considering this request.
>
> The District Negotiating Team

16. The District did not enter into an agreement with the Teamsters wherein it agreed to limit the total base wage increase for the Association membership to the same zero percent total base wage increase as was agreed to for 2011 – 2012 with the Teamster bargaining unit membership.

17. The District bargained in good faith during negotiations for the 2011 – 2012 collective bargaining agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. By its actions herein, the District did not engage in bad faith bargaining and therefore did not violate §§ 111.70(3)(a)4 or 1, Stats.

2. To the extent that Weninger took actions in this case, those actions were in his capacity as Superintendent of the District and, therefore, not individual actions in violation of § 111.70(3)(a), Stats.

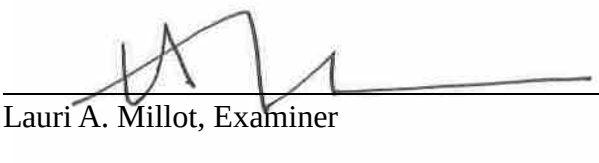
Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The Complaint is dismissed.

Dated at City of Rhinelander, Wisconsin, this 1st day of October 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



Lauri A. Millot, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer:

> [t]o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

A violation of § 111.70(3)(a)4, Stats., results in a derivative violation of § 111.70(3)(a)1, Stats. Section 111.07(3), Stats., which is made applicable to this proceeding by § 111.70(4)(a), Stats., states that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

The duty to bargain is derived from § 111.70(1)(a), Stats., which provides:

> Collective bargaining means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement or to resolve questions arising under such an agreement, with respect to wages, hours and conditions of employment … .

The Commission has adopted a "totality of the circumstances" test to determine whether an employer has fulfilled its duty to bargain. Milwaukee County, Dec. Nos. 32912-D, 32913-D and 33001-C, (Houlihan, 10/21/10). The period of time to consider is when the Association informed the District in February 2011 that it wanted to open bargaining through August 13, 2013, when the complaint was filed.

The parties' bargaining was ensnared by the presentation and litigation of 2011 Wisconsin Act 10. They exchanged initial proposals on June 2, 2011, engaged in collective bargaining on June 15, 2011, but then did not meet again until August 2012. Neither the Association nor the District asserted that any delay during the pendency of this litigation was dilatory, but rather appears to be the result of a bilateral agreement pending clarity and finality to 2011 Wisconsin Act 10.

When the District and the Association returned to the table on August 23, 2012, the District proposed a zero percent total base wage increase and the elimination of all but the recognition, duration, wages, and miscellaneous clauses of the 2009 – 2011 collective bargaining agreement. At that same session, the Association proposed a 1.64% total base wage increase. Although a voluntary agreement was not reached on that date, the parties meaningfully negotiated.

The parties met on September 6, 2012, and neither the Association nor the District changed its proposal from the August 23, 2012 meeting.

The Association and District next met on October 16, 2012. Both the Association and the District moved from their August 23, 2012 positions. The District offered the Association a 0.5 percent total base wage increase calculated using ERC 90 and a savings clause that would prohibit the Association from returning to the bargaining table if the Wisconsin Supreme Court upheld Judge Colas' decision.[1] In response, the Association reduced its total base wage proposal to 1.4 percent, agreed to the use of ERC 90, but did not agree to the District's proposed savings clause. The District then increased its total base wage offer to 1 percent coupled with the ERC 90 rule and its previously offered savings clause. The parties did not reach a voluntary agreement, but engaged in meaningful negotiations.

The Association and District next met for the purpose of bargaining on July 8, 2013. The District presented the Association with two, one-year wage proposals: for the 2011 – 2012 school year, a total base wage increase of zero percent; and for the 2012 – 2013 school year, a 1 percent increase in total base wages. The Association responded repeatedly that its authority was limited to the 2011 – 2012 school year and proposed a 1 percent total base wage offer. The District continued to offer two one-year proposals; maintaining the zero percent total base wage offer for the 2011 – 2012 school year and increasing to a 2 percent total base wage offer for the 2012 – 2013 school year. After this bargaining session, the Association filed its complaint.

Looking to the "totality of the circumstances," the evidence does not support a finding that the District engaged in bad faith bargaining. The essence of the Association's bad faith argument is that there was an alleged agreement with the Teamsters which constrained the District's actions when bargaining with the Association. The facts do not support this conclusion. The parties engaged in bilateral collective bargaining over the course of 25 months. During this time, both sides presented proposals and both sides made modifications to those proposals. The District started with a total wage proposal of zero percent and, although the timing of that proposal followed the District's tentative agreement with the Teamsters on May 29, 2012, the District increased its offer to 1 percent on October 16, 2012, which was more than the zero percent the District had tentatively agreed to with the Teamsters.

The Association focuses on the District reducing the total base wage offer from 1 percent offered on October 16, 2012, to "0% after the tentative agreement with the Teamsters was ratified and became a contract on October 24, 2012." Association Reply Brief at 9. The problems with the Association's argument are that (1) it is factually inaccurate in that the District ratified the tentative agreement on September 11, 2013, and (2) the District reached the tentative agreement with the Teamsters on May 29, 2012; therefore, May 29, 2012, would have been the date specific when the District's alleged obligation to the Teamsters attached. If indeed an agreement was reached to limit the teachers' total base wage increase to zero percent, then the District reneged on this "deal" on October 16, 2012, when it offered a 1 percent increase in total base wages.

[1] Madison Teachers Inc., et. al v. Walker, et. al, Case 2011CV000374.

As to what Weninger uttered on July 9, 2013, I find that he did make reference to a "commitment" and, further, that it was made in a manner that implied an agreement between the District and the Teamsters; but there is insufficient evidence to establish that an actual agreement was entered into between the District and the Teamsters. The Association called eight witnesses that were present at the July 9, 2013 meeting and heard Weninger respond to an Association inquiry as to the District's rationale for offering a zero percent total base wage increase. Teachers Tracy Pharao-Kozak, Glen Reindl, Tiffany Reindl, and Daniel Hoppe, and UniServ Director Joan Heithoff all testified that they heard Weninger state that he needed to honor a "commitment" to the Teamsters to hold the teachers to a zero percent total base wage increase. Retired teacher George Meeks testified that Weninger made a "promise" to the Teamsters. Teachers Mark Totten and Marlene Mclarnan did not recall specifically what term Weninger used, but understood that there was an agreement with the Teamsters.

In contrast, District witness Tom Owens testified that he did not hear Weninger make a statement about a promise or commitment to the Teamsters. District witness Keith Williams testified that he did not hear Weninger use the word "promise," but that "he [Weninger] would have said that we [District] had had an arrangement with the Teamsters that he was hoping that we could be consistent with, but he didn't use the word promise." April 9, 2014 Hearing Transcript (hereinafter "Tr.") at page 201. Weninger testified that he said, "… we made a commitment to the Teamsters that we were going to approach bargaining in the same way with the teachers that we did with them … ." and, "I never used the word 'promise.' I used the word 'commitment' in the sense of a commitment of an approach." Tr.263-264.

The evidence establishes that Weninger used the term "commitment" when explaining why the District was offering the Association the same total base wage increase that the District agreed to with the Teamsters. Neither Owens nor Williams contradicted the Association witnesses. Rather, both testified they did not hear Weninger say "commitment" or "promise." As to Weninger, while it may be that he believed he did not say that a "commitment" was made relative to the Teamsters, his testimony was self-serving and conflicted with his affidavit.[2]

Even though the evidence establishes that Weninger articulated a "commitment" to the zero percent total base wage offer extended to the Teamsters, the record is void of any evidence that affirms that an actual agreement was entered into by the District and the Teamsters. When asked, Owens, Williams, and Weninger denied the existence of an agreement. Neither the Association nor the District called Mitch Perkl or any other Teamster bargaining unit member to affirm or negate the existence of an agreement. The only indicia of an agreement can be found in Weninger's July 16, 2013, email to the Association Negotiations Team wherein he states that "we are trying to respect an agreement (sic) the Teamsters … ." The absence of a word between "agreement" and "the" makes the sentence incomplete and ambiguous. Lacking any proof as to the existence of a bilateral agreement between the District and the Teamsters, the record suggests that the District unilaterally vowed to treat the Association in the same manner as the Teamsters.

[2] Respondents argued the credibility theories of Elizabeth Loftus in its post-hearing brief and offered excerpts of her writing. Complainant moved to strike asserting an improper presentation of evidence post hearing. Having resolved this issue by disregarding this portion of Respondents' brief, I decline to address the Association's motion.

This conclusion is supported by District Board of Education member Lisa Totten's testimony. Ms. Totten testified that on July 9, 2013, the District's bargaining committee "presented the offer that was authorized" (Tr.82), and that she was "shocked" by Weninger's open meeting revelation because it was the "offer that was given to the Teamsters and that the commitment from the board was that what they gave – they weren't going to give the teachers any more than what they gave them [Teamsters]." Tr.99. Weninger explained Ms. Totten's comments to Association counsel during cross examination:

> Q: What she said about honoring a commitment to the Teamsters in offering the 0 percent as part of your strategy, that was incorrect?
>
> A: It would be incorrect to say that we made a commitment to the Teamsters about 0 percent. As you've pointed out, words are very important. The statement was that we made a commitment that the approach to the bargain with the SPAEA was going to be the same as it was with the Teamsters and it was our intention and hope that the SPAEA would see that the District could not afford to put anything on the base wage for '11-'12, but that's why we offered different packages.

Tr.280-281.

It is not unlawful for the District to strategically bargain such that its wage proposal is the same for all employees. Ms. Totten's testimony establishes that the District engaged in discussions during the closed session portion of the Board of Education meeting, wherein it strategized and pledged to treat the teachers in the same manner as the bus drivers and mechanics. Given the District's decision to issue an equal amount in the form of a supplemental payment to all staff, this approach is believable.

The Association alleged that the District's "announcement that it had a commitment to the Teamsters to hold the SPAEA wage increase to 0% constituted a *per se* violation of the duty to bargain in good faith." The Association offers no legal support for this conclusion. While there are recognized per se violations of the duty to bargain in good faith, the Association has not asserted that the District unilaterally changed a mandatory subject of bargaining, bargained directly with employees, refused to execute a written contract, refused to meet and confer at reasonable times or exercised undue delay, or insisted on bargaining a non-mandatory subject. Hardin, *The Developing Labor Law*, 3rd ed., Vol. I (1998), p.596-608; School District of Wisconsin Rapids, Dec. No 19084-C (WERC, 3/85); Milwaukee Board of School Directors, Dec. No. 15197-B, 15203-A (Yaeger, 12/81); Village of Saukville, Dec. No. 28032-B (WERC, 3/96); Oconto County, Dec. No. 26289-A (Gratz, 7/90), aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90); Unified School District No. 1 of Racine County, Dec. No. 15915-B

(Hoornstra, with final authority for WERC, 12/77) at 3. Weninger's disclosure on July 9, 2013, did not amount to a violation of § 111.70(3)(a)(1), Stats., *per se* or otherwise.

The Association next takes issue with the District's July 8 and July 9, 2013, proposals which encompassed two years rather than one year and asserts that this was bad faith because the Association informed the District that it was only authorized to bargain for the 2011 – 2012 school year. The District's clearly futile efforts to expand the bargain to a second year, albeit characterized as two, one-year labor agreements, does not constitute bad faith bargaining. It is not bad faith to offer, and in this instance, reoffer a proposal. The District's intent was to reach a voluntary zero percent total base wage increase for the 2011 – 2012 school year by enticing the Association with a "lucrative" base wage increase in the 2012 – 2013 school year. That was strategic, not bad faith. The District was no more obligated to modify its strategy and offer only a one-year proposal than the Association was obligated to expand its bargaining position from one year to two years.

The evidence does not support that the District bargained in bad faith in violation of § 111.70(1)(a)3, Stats. Accordingly, the Association's § 111.70(1)(a)1, Stats., derivative claim fails.

Finally, the District has requested costs and attorney fees. The examiner does not deem the complaint so frivolous, devoid of merit or in bad faith to justify the awarding of fees or costs. Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).

Dated at City of Rhinelander, Wisconsin, this 1st day of October 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Lauri A. Millot, Examiner