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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ROY RATLIFF and K.S., M.A., P.P., and A.R., individually and as parents and next friends of their minor children, Plaintiff, vs. WEST ADA EDUCATION ASSOCIATION, INCORPORATED, Defendant.	Case No. CV01-20-17078 DEFENDANT'S RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs' motion for preliminary injunction should be denied in its entirety for the simple reason that Plaintiffs have failed to carry their burden of proving any entitlement to such an injunction. They have not proven a high probability of success on the merits; they have not addressed the numerous and readily apparent bases for finding that the case is nonjusticiable;

they have not proven that they are likely to suffer irreparable harm, or harm of any kind; and they have not even alleged that they have any individual rights whatsoever that have been or will be violated by the Defendant West Ada Education Association. Finally, to the extent that there is any small possibility of prevailing on the merits, the Court should simply allow this case to follow the usual course, in which the parties follow the rules of civil procedure and secure a just resolution in the normal course of the Court's business. There is no basis upon which the Court can justify preliminary relief or remedy of any kind.

I. Introduction and Facts

The Court has properly set this case for an evidentiary hearing before ruling on the motion for preliminary injunction. By the conclusion of the hearing, the facts will demonstrate the following.

The West Ada Education Association ("WAEA") is a private association that exists to serve the interests of educators employed by the West Ada School District. WASD and WAEA have negotiated a lengthy contract which establishes a set of private rights and responsibilities. While WAEA is a party to that contract, WAEA is not employed by the District, is not itself engaged in the provision of educational services, and its relationship with WASD is governed almost entirely by the Idaho Professional Negotiations Act, Idaho Code 33-1271 through 1276. The Professional Negotiations Act was first adopted in 1971 and can now boast 50 years of judicial decisions construing it, including multiple decisions addressing the incorporation of existing law, exceptions to the incorporation doctrine, the nature of the duty to bargain, and the various methods available for enforcement of those rights and responsibilities.

In addition to the collective bargaining agreement between WASD and WAEA, each of the approximately 2,100 teachers at WASD has his or her own, individual contract with WASD. Those contracts are supposed to be on forms approved by the State and intended to likewise

reflect the existing state of the law, including the incorporation doctrine. Idaho Code 33-513(1). The Idaho Department of Education is the entity that approves those contracts and establishes the professional and ethical duties of teachers who are certified by the State. Idaho Code 33-1254.

In August, 2020, the WASD adopted a district policy for addressing the ongoing global pandemic associated with a novel coronavirus responsible for a disease most often identified as Covid-19. Covid-19 is believed to be easily spread, especially in confined, indoor spaces. It is also potentially deadly on its own or, more often, in conjunction with other pre-existing conditions such as heart disease, asthma, respiratory diseases, obesity, and old age. In addition to being potentially deadly, those who contract the disease and survive may face months or even years of ongoing, debilitating symptoms such as difficulty breathing, muscle weakness, impaired lung capacity, and more.

The August, 2020, WASD policy provided that WASD would adjust its learning practices based on the decisions of public health authorities at the Central District Health Department ("CDH"). Where CDH determined that there was "substantial community spread" of covid-19, WASD's policy called for remote learning only in order to protect students, families, teachers and staff from this deadly, disfiguring and debilitating disease. School district policies are expressly incorporated into and become a part of each teacher's individual contract. School district policies are likewise incorporated into and a part of the collective bargaining agreement between WASD and WAEA.

In October, 2020, CDH announced that there was substantial community spread of covid-19 within the communities that make up the West Ada School District. Teachers and the WAEA expected that WASD would implement their existing policy and revert to online/distance learning in order to prevent an outbreak of the virus, and to protect students and staff. The

WASD, bowing to political pressure announced it would continue with a blend of in-person and online learning. This decision put teachers at considerable risk of contracting a deadly virus. The WAEA and at least some teachers also believed this refusal to follow its own policy amounted to an intentional and material breach of contract by WASD as well as demonstrating a refusal or failure to provide a reasonably safe workplace for teachers and staff.

Following WASD's abandonment of its own safety policies, a number of teachers informed WAEA's President, Eric Thies, that they intended to call in sick, a contractual right they negotiated for and which is guaranteed to them by contract. These teachers believed that calling in sick was the only way to draw attention to the fact that WASD had violated its own policies and by doing so was putting their lives and health at risk[1]. The WAEA, acting through its President Eric Thies, first asked teachers to delay their "sick out" until the following week, in order to give patrons of the District more time to prepare. Then, it offered to support every teacher regardless of what that teacher decided to do.

Ultimately, approximately one-third of the teachers at WASD called out sick for Monday, October 19, 2020. Approximately 500 teachers called out sick on Tuesday, October 20, 2020. WASD determined it would cancel two days of school rather than attempt to replace the teachers who called in with substitutes or otherwise. School resumed on October 21.

While the teachers were engaged in calling in sick, Idaho Freedom Foundation, a lobbying and public relations organization recruited parents of WASD students to engage in this

[1] It is worth noting that nothing in any of the contracts limits the use of "sick leave" to instances where a teacher is physically ill. Sick leave is routinely available to teachers who wish to avoid bad health outcomes, not merely as a reaction to such outcomes. Teachers call in sick in order to go to medical appointments for sickness prevention; they call in sick when a day off is needed for illness prevention; and, they call in sick when their emotional or psychological health requires it. Indeed, discrimination against mental health needs, as opposed to physical health needs, is expressly prohibited by law.

lawsuit. It then filed its suit the day before Plaintiffs' children were returning to school. There have been neither sick outs nor any kind of work stoppage since then.

II. Legal Standards

Idaho law provides at least two sources for legal standards governing the issuance of preliminary injunctions. Idaho Rule of Civil Procedure 65(e) provides possible grounds for an injunction. These grounds are supplemented by a long history of decisional law which has fleshed out the bare bones requirements of Rule 65. Applying both of those sources, the standards for a preliminary injunction potentially relevant to this case are easily discerned.

Plaintiffs rely mainly, it seems, on Rule 65(e)(1) allowing an injunction "when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of."

This is meant to be a high bar. A preliminary injunction "is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Harris v. Cassia County,* 106 Idaho 513, 518 (1984), citing *Evans v. District Court of the Fifth Judicial Dist.*, 47 Idaho 267, 270 (1929) and *Brady v. City of Homedale*, 130 Idaho 569, 572 (1997). The *Harris* Court ruled that:

> The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *First National Bank & Trust Co. v. Federal Reserve Bank*, 495 F.Supp. 154 (W.D.Mich. 1980); *Avins v. Widener College, Inc*., 421 F.Supp. 858 (D.Del.1976) (not granted where issues of fact and law are seriously disputed); *Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc*., 62 A.D.2d 1053, 404 N.Y.S.2d 133 (N.Y.App.Div.1978) (granted only upon the clearest evidence). Appellants' claim of right in this case is not one which is free from doubt and, accordingly, we hold that appellants have not carried their burden of proof under I.R.C.P. 65(e)(1).

Id. Furthermore, the *Harris* court found that an injunction should not issue where the alleged harm is not likely to recur because the parties have corrected whatever legal failure might have occurred. *Id.*

III. Plaintiffs' Motion Raises More Questions Than It Answers and Plaintiffs Have not Proven A Likelihood of Success on the Merits.

There is an incredible array of complex, disputed, and uncertain legal and factual issues in this case that render a preliminary injunction inappropriate. These disputes can only be understood by starting with a careful reading of *School Dist. No. 351 v. Oneida Ed. Assn.,* 98 Idaho 486 (1977), and the issues that the *Oneida* Court instructed were particularly relevant when determining whether to enjoin a threatened strike by teachers.

A. *Oneida* Makes Clear that No Injunction Should Issue if There Has Been a Failure of the Collective Bargaining Process.

In *Oneida* a local education association had taken a strike vote, and stated its intent to strike over a school district's failure to bargain in good faith and its refusal to enter into a contract. The district court entered an injunction prohibiting the strike based on its conclusion that public employee strikes were unlawful at common law and the legislature had not implicitly permitted such strikes. The risk of a strike was clear and unequivocal. The Supreme Court eventually took up the case and addressed the propriety of that injunction:

> The trial court ruled as a *matter of law* that the injunction should issue and we must assume, in the absence of any evidentiary record, that he concluded that a strike by teachers is illegal in Idaho. Assuming without deciding that he was correct in this conclusion, nevertheless, mere illegality of an act does not require the automatic issuance of an injunction. *Anderson v. Trimble*, 519 P.2d 1352 (Okl.1974) cert. denied, 419 U.S. 995, 95 S.Ct. 308, 42 L.Ed.2d 269; *Nathan H. Schur, Inc. v. City of Santa Monica*, 47 Cal.2d 11, 300 P.2d 831 (1956); *State v. Davis*, 65 N.M. 128, 333 P.2d 613 (1958); *Eckdahl v. Hurwitz*, 103 P.2d 161 (Wyo.1940). Contra, *Kleinjans v. Lombardi*, 478 P.2d 320 (Hawaii 1970). *See, Carroll v. President & Commissioners of Princess Ann*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968).
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> That logic has been expressly applied to situations involving teacher strikes and the automatic issuance of an injunction has been refused and condemned. *School Dist. for City of Holland v. Holland Educ. Assoc*., 380 Mich. 314, 157 N.W.2d 206 (1968); *School Com. v. Westerly Teachers Assoc., supra; Timberlane School Dist. v. Timberlane Educ. Assoc*., 114 N.H. 245, 317 A.2d 555 (1974).

> In the private sector the right to strike is viewed as an integral and necessary part of the collective bargaining process. However, in the public sector the denial of the right to strike has the effect of weighing the scales heavily in favor of the government during the collective bargaining process. In Idaho our legislature has made the policy judgment as to the merits of *not* providing public employees with the right to strike. Rather, it has developed statutory alternative processes to resolve labor disputes between teachers and school boards. It would not be an appropriate judicial function to fault the legislature in those determinations.
>
> We cannot ignore an *alleged* refusal to abide by and engage in those legislatively authorized procedures for resolution of impasse situations. While neither we nor the trial court should condone or approve the calling of an illegal strike by appellants (although the record does not appear to demonstrate actual engagement in strike and picketing procedures), neither should we or a trial court condone or approve the failure to abide by and utilize the statutorily prescribed procedures for possible resolution of the problem. It has long been a basic maxim of equity that one who seeks equitable relief must enter the court with clean hands.
>
> We hold that the trial court erred in issuing the orders complained of here in what was effectively an ex parte proceeding. If testimony had been permitted and required and the trial court had accepted as correct the allegations of the appellant regarding the bad faith of the school board, he might have issued the injunction, but also as a corollary thereof required the school board to engage in the statutorily mandated impasse procedure. Such order did issue but not for some months following the issuance of the preliminary injunction.

Oneida at 490-91.

The clear message of *Oneida* is that the district courts must carefully weigh and determine the factors relevant to issuance of a preliminary injunction. Furthermore, the propriety of such an injunction in a case over a threatened strike by teachers will depend, in part, on whether the collective bargaining and impasse resolution procedures set out in the Professional Negotiations Act have been, are being or will be followed. The cases cited by the Court in *Oneida* reinforce that these factors are critical in the injunction analysis. In *School Dist. for City of Holland v. Holland Educ. Assoc.*, 380 Mich. 314, 157 N.W.2d 206 (1968) an injunction against striking was reversed for the simple reason that no showing had been made other than that an allegedly illegal strike might happen. This, the Michigan Supreme court found, was

inadequate and an injunction should issue only if there was an adequate showing of "violence, irreparable injury, or breach of the peace." 157 N.W. 2d at 210.

The New Hampshire Supreme Court went a step further, finding that injunctions against public employee strikes should be disfavored, and should issue only if the direct parties to the dispute, tried but were unable to find any other resolution to their dispute. *Timberlane School Dist. v. Timberlane Educ. Assoc.*, 114 N.H. 245, 317 A.2d 555 (1974). According to that Court:

> We are persuaded by these recent developments that it would be detrimental to the smooth operation of the collective bargaining process to declare that an injunction should automatically issue where public teachers have gone on strike. The essence of the collective bargaining process is that the employer and the employees should work together in resolving problems relating to the employment. The courts should intervene in this process only where it is evident the parties are incapable of settling their disputes by negotiation or by alternative methods such as arbitration and mediation. Judicial interference at any earlier stage could make the courts "an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining processes." *School Committee v. Westerly Teachers Ass'n*, 299 A.2d 441, 446 (R.I. 1973). Accordingly, it is our view that in deciding to withhold an injunction the trial court may properly consider among other factors whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue.

*Id.*at 558-559. The trial court in that case had carefully considered these factors, denied the motion for a preliminary jurisdiction, and was affirmed by the state Supreme Court. *Id.*

In the instant case WASD adopted a policy, which was incorporated both as a matter of law and expressly, into the individual contracts of teachers, as well as the collective bargaining agreement. WAEA and its members believe and assert that by not following their own policy, they have breached their contract. Further, Defendant asserts that by changing their policy without first bargaining, they have committed an unlawful violation of the duty to bargain in good faith. *Katz v. NLRB*, 369 US 736 (1962) (holding that unilateral changes in conditions of employment violate the legal duty to bargain in good faith).

Plaintiffs claim this case does not implicate collective bargaining because it is somehow "outside" the collective bargaining process. They misunderstand that process. The duty to bargain "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). In *Steelworkers v. Warrior & Gulf Co.*, 363 574, 581 (1960), the Supreme Court held that the resolution of ongoing disputes between parties, including disputes about whether the contract has been violated are "in other words, a part of the continuous collective bargaining process."

This is absolutely a case about collective bargaining and the alleged violation by WASD of the incorporated terms of the contracts, as well as what Defendant alleges is the violation of the statutory duty to bargain in good faith. The parties to that collective bargaining agreement, WAEA and WASD, are taking steps to try to resolve their dispute. WASD has taken steps it considers appropriate to address those teachers who chose to participate in the sick out. WAEA intends to ask WASD to engage in further bargaining, and is further considering whether its members have the right to initiate and pursue grievances under the collective bargaining agreement or even to bring breach of contract claims to raise before Idaho courts.

Neither WASD nor WAEA has exhausted its options and opportunities to resolve the disputes between them. They are still talking, and still seeking resolution. As *Oneida* made clear, this type of collective resolution of the dispute is to be preferred and given room and opportunity to occur before an injunction can issue.

B. There Are Substantial Questions About Whether This Case is Now Moot.

The Idaho Supreme Court has also made clear that:

> [I]njunctions should issue only where irreparable injury is actually threatened. *See Cazier v. Economy Cash Stores, Inc.*, 71 Idaho 178, 187, 228 P.2d 436, 441 (1951); Wright & Miller, *Federal Practice and Procedure: Civil* § 2942 (1973). Where the conduct causing injury has been discontinued, the dispute is moot and the injunction should be denied. Wright & Miller, *supra*, § 2942, p. 371.

O'Boskey v. First Fed. Sav. & Loan Ass'n, 112 Idaho 1002, 1007(1987).

Here, WAEA has explained that it was unaware that a sickout might be considered an unlawful strike, and that it has no intention of undertaking any unlawful work stoppages in the future. *Affidavit of Eric Thies*. The mere promise not to do in the future what it has done in the past is not alone enough to render the case moot. However, the dispute here between the teachers and WASD is presently being addressed by WAEA and WASD through the collective bargaining process set out in the Professional Negotiations Act. That another method of dispute resolution exists changes this from the routine case where one party simply declares it will sin no more. The existence of a legislated method of resolution is likely to render the present dispute moot. An injunction would only be appropriate if Plaintiffs could demonstrate a high probability of demonstrating that mootness has not and will not occur.

C. There are Substantial Questions About Whether the Proper Parties, Including Real Parties In Interest are Involved in this Case.

Defendant has moved to dismiss this case for lack of standing and for failure to join real parties in interest. Rather than repeating those arguments herein, Defendant would incorporate its brief in support of the motion to dismiss.

If the Court determines that the Plaintiffs do have standing, and are the real parties in interest, then such arguments would no longer be relevant. But if the Court merely takes those matters under advisement, it cannot issue an injunction until they are resolved. Proving a likelihood of success is impossible if those issues are unresolved, or if determination of those issues turns on disputed issues of fact.

If there is a significant risk that Plaintiffs lack standing or that the real parties in interest are not present, the injunction should be denied.

IV. The Injunction Should be Denied Because Plaintiffs Have Entirely Failed to Show A Likelihood of Irreparable Harm

Rule 65(e)(2) allows an injunction if Ps show a likelihood of irreparable harm. Based on the affidavit of Mr. Thies, there is no such likelihood. While the WAEA's disavowal of future sick outs may or may not be adequate to demonstrate mootness, it is entirely sufficient to prove that there is no substantial risk of irreparable harm. Again the Idaho Supreme Court has explained:

> We have previously stated that "a preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Evans v. District Court of the Fifth Judicial District*, 47 Idaho 267, 270, 275 P. 99, 100 (1929); *quoted in Farm Service, Inc. v. United States Steel Corp.*, 90 Idaho 570, 587, 414 P.2d 898, 907 (1966). The district court's findings state that: "[the] evidence clearly indicates that neither of the named plaintiffs nor, for that matter, any of the other proposed plaintiffs whose records were presented are in danger of any irreparable damage." We agree. The evidence indicated that the April 12, 1982, action of the board of county commissioners of Cassia County had been reversed and brought current prior to argument on appellants' motion for the preliminary injunction. In fact, at the time of oral argument, neither appellant had a pending or unpaid application before Cassia County for indigent aid.

Harris v. Cassia County, 106 Idaho 513, 518 (1984). In the present case, teachers engaged in an alleged work stoppage on October 19 and 20, but there is no evidence presently, and none will be presented at hearing, to demonstrate that there is a likelihood of another work stoppage. While the Defendant would bear the burden of proving mootness, irreparable harm is the Plaintiffs' burden. Like the conduct in *Harris*, here the work stoppage started and then was "reversed" long before "argument on [plaintiffs'] motion for the preliminary injunction."

The preliminary injunction should be denied under Rule 65(e)(2) unless Plaintiffs can show a strong likelihood that another allegedly illegal work stoppage will occur in the absence of an injunction. This they cannot do.

Respectfully submitted this 16th Day of November, 2020.

PIOTROWSKI DURAND, PLLC

/s/ James Piotrowski
James Piotrowski
Attorney for Defendant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 16th day of November, 2020, I caused a true and correct copy of the forgoing to be served upon the following parties by the method indicated below, and addressed to each of the following:

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