STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEST ALLIS-WEST MILWAUKEE EDUCATION ASSOCIATION, Complainant, vs. JOINT CITY SCHOOL DISTRICT NO. 1, WEST ALLIS-WEST MILWAUKEE, ET AL., Respondent.	Case XIII No. 15630 MP-138 Decision No. 11014-A

Appearances:
Mr. Richard Perry, Attorney, Mr. Nicholas A. Malett, Chairman, Professional Rights and Responsibilities Committee, Mrs. Sadie Frohna, President, Teacher Aide Association, Mrs. Tessie Kornowski, Vice President, Teacher Aide Association, appearing on behalf of the Complainant.
Mr. William T. Schmid, City Attorney, City of West Allis, and Mr. M. R. Taylor, Superintendent of Schools, Joint City School District No. 1, West Allis-West Milwaukee, et al., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having authorized John T. Coughlin, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wisconsin Statutes, and a hearing on such complaint having been held at Milwaukee, Wisconsin, on June 15, 1972, before the Examiner, and the Examiner having considered the evidence, arguments and briefs of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That West Allis-West Milwaukee Education Association, hereinafter referred to as the Complainant, is a labor organization with offices at 10201 West Lincoln Avenue, West Allis, Wisconsin.

2. That Joint City School District No. 1, West Allis-West Milwaukee, et al., hereinafter referred to as the Respondent, is a Municipal Employer with its principal office located at 9333 West Lincoln Avenue, West Allis, Wisconsin.

3. That at all times material herein, the Respondent has recognized the Complainant as the exclusive bargaining representative "for all teacher aides, orthopedic matrons and instructional aides employed by the School District as certified by the Wisconsin Employment Relations Commission on October 28, 1970"; that in said

relationship, the Respondent and the Complainant, have been, at all times material herein, parties to a collective bargaining agreement covering the wages, hours and conditions of employment for the aforesaid employes; that the aforementioned agreement was executed in July of 1971 but was effective from January 1, 1971 through December 31, 1972, and, therefore, said agreement was effective at all times material herein; that said agreement includes a grievance procedure but does not provide for final and binding arbitration of grievances at the times relevant in this matter.

4. That the collective bargaining agreement referred to above contained the following relevant provisions:

"ARTICLE II
WAGES

1. Retroactive to January 1, 1971, the rates of pay for Teacher Aides and Instructional Aides shall be as follows:

Years of Continuous Employment:	Less than one	One	Two	Three	Four or more
Hourly Rate of Pay:	2.46	2.51	2.57	2.62	2.68

Effective as of January 1, 1972, the rates of pay for Teacher Aides and Instructional Aides shall be as follows:

Years of Continuous Employment:	Less than one	One	Two	Three	Four or more
	2.63	2.69	2.75	2.80	2.87"

"ARTICLE III - HOURS

1. Any Teacher Aide or Instructional Aide who (i) is in the employ of the Board on the execution date of this Agreement or (ii) who is hired hereafter with the express understanding that this paragraph applies to him, normally will be employed for a minimum of six hours per day for the days that children are in school. The starting time may vary but the day will end six and one-half hours later, thus allowing a one-half hour lunch period.

. . .

3. If any Teacher Aide, Instructional Aide or Orthopedic Matron is hereafter employed on a normal hour basis less than that set forth in paragraph 1 or 2 above, whichever shall apply, such individual shall be terminated before there is any reduction in force of those employees in his classification who are covered by paragraph 1 or 2."

"ARTICLE IV - BENEFITS

A. Hospital and Surgical Insurance

1. An Employee is not eligible for Blue Cross and Surgical Insurance unless employed a total of

six hundred hours per year. No Employee is eligible unless he has worked six months. If an Employee qualifies for a six hundred hours job and has Blue Cross and Surgical Insurance at the time of his employment such Employee may purchase the six months coverage through a payroll deduction. This insurance covers the Employee, the Employee's spouse and children. Coverage of children is extended through the month they marry or through the calendar year they become nineteen years of age, if they are not students, or through the calendar year they become twenty-three years of age if they are students."

"ARTICLE VIII - MANAGEMENT

Except as otherwise expressly provided in this Agreement, the management of the school system and the direction of all personnel are vested exclusively in the Board, including but not limited to the right to hire, the right to discharge, suspend or otherwise discipline, the right to establish, revise and delete assignments and duties of Employees and the rules and regulations governing their employment, the right to transfer and the right to determine hourly and daily schedules of employment, and the right to reduce the work force for economic or other legitimate reasons. The Board shall be the exclusive judge of all matters relating to the conduct of its business, including but not limited to the buildings, equipment, methods and materials to be utilized. Nothing in this Agreement shall limit in any way the Board's contracting or subcontracting of work or shall require the Board to continue in existence any of its present programs in its present form and/or location or on any other basis."

"ARTICLE XI - DURATION OF AGREEMENT

1. This Agreement shall continue in full force and effect to and including December 31, 1971, except as provided in Paragraph 2 below.

2. If the Board adopts a budget which includes the financial terms of this Agreement for 1972 and submits such budget to the City Clerk of the City of West Allis on or before September 1, 1971, pursuant to and in accordance with Chapter 1, Section 1.04 of the Revised Municipal Ordinances of the City of West Allis and any applicable provisions of the Wisconsin Statutes, then in that event this Agreement and all terms and conditions hereof shall automatically renew and continue in full force and effect from January 1, 1972, to and including December 31, 1972. In the event the Board fails to act as set forth above, the Association may, within five days after the date set for such action, notify the Board that they choose to reopen and renegotiate the Agreement for 1972. Such reopener shall take effect on January 1, 1972.

3. In the event this Agreement is automatically renewed as provided above in paragraph 2, the parties hereto agree upon written notice given by either party on or before May 15, 1972, to meet and negotiate in good faith the terms of a successor agreement.

4. In consideration of the Board's agreement upon a December 31 termination date, the Association agrees that there shall be no retroactive wage or benefit adjustment if a successor agreement is not consummated on or before January 1, 1973."

5. That on November 30, 1971, Respondent's Fiscal Board adopted a school budget which contained a net reduction in said budget of $565,000.

6. That at all relevant times prior to January 3, 1971, the teacher aides normally worked six hours per day.

7. That on January 3, 1972, the School Board approved the reduction in the 1972 school budget to hold said budget within the monies approved by the Fiscal Board in November of 1971.

8. That on January 5, 1972, Respondent's Superintendent of Schools, by a letter, notified Complainant's Vice President as follows:

"January 5, 1972

Dear Mrs. Kornowski:

The Board of Education at the January 3, 1972 meeting, was forced to make drastic reductions in the 1972 budget because of cuts by the Fiscal Board of this District. The Board had previously indicated to the Fiscal Board that cuts beyond $377,000 would cause a cut in instructional programs; in final action, the 1972 budget was cut $318,000 beyond the $377,000 which we had said we could live with if necessary. Board of Education action was taken to make reductions which would appear to have the least negative effect on the instruction program and which would cut back rather than eliminate any existing programs with the hope that such reductions can be restored in the 1973 budget.

Accordingly, the following reductions have been made in the budget:

Reduce Grounds Upkeep	$70,000.00	Jr. & Sr. High Athletics	$10,000.00
Additional Recreation	30,000.00		
Custodial Cleaning	25,000.00	Fringe Benefits	15,000.00
Teacher Aides	54,000.00	Elementary Art & Music	50,000.00
Summer Curriculum	10,000.00	Kindergarten	54,000.00
			$318,000.00

The reduction for teacher aides means that we will reduce the working hours of all regular teacher aides from six hours to three hours per day. Orthopedic aides will continue their present schedules because of the special care which they must give to the orthopedic school students. The reduction in hours from six to three will become effective January 17, 1972, and principals of respective buildings will be given the authority to work out individual schedules (not to exceed a total of fifteen hours per week) which will serve the best interests of all concerned. Fringe benefits will be paid for all aides currently employed through the last day of February, 1972, but will be discontinued from March 1 through the remainder of 1972 because of the reduction in hours below that required to be eligible for such benefits (600 hrs. per year).

It is the intention of the Board of Education to seek restoration of all program funds in the 1973 budget. For that reason I would like to encourage each teacher aide to stay with us despite this year's reduction. We believe that this kind of experience in budget cutting will lead to a citizen demand for a return to full programs which were in effect during 1971.

Best wishes to you for all of 1972 despite our present budget difficulties. We appreciate the contributions you have made and are continuing to make to our total school operation. Kind personal regards.

Sincerely,

MRT/am

M. R. Taylor
Superintendent of Schools"

(Emphasis supplied.)

9. That on January 17, 1972, Respondent reduced the working hours of all of its teacher aides from six to three hours per day.

10. That on February 22, 1972, Respondent learned that its 1971 year end general fund surplus was $350,000 in excess of what had been originally estimated.

11. That effective February 24, 1972, the teacher aides were returned to a regular daily six hour working schedule.

12. That Mary Ann Kalamarz, a teacher aide, who had qualified for family health coverage under the contract, relied on Respondent's January 5, 1972, letter to Complainant which stated in relevant part that, "Fringe benefits will be paid for all aides currently employed through the last day of February, 1972, but will be discontinued from March 1 through the remainder of 1972 because of the reduction in hours below that required to be eligible for such benefits (600 hours per year)", resulting in her having to make additional payments amounting to $31.75 for such insurance at her husband's place of employment.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondent by reducing the normal working hours of all regular teacher aides from six to three hours per day for the period of January 17, 1972 up to but not including February 24, 1972, did violate Article III of its collective bargaining agreement with Complainant Association and thereby violated Section 111.70(3)(a)5 of the Wisconsin Statutes.

2. That Respondent by its letter of January 5, 1972, which expressed its intention of discontinuing fringe benefits for teacher aides as of March 1, 1972, resulting in a member of the Complainant Association, namely, Mary Ann Kalamarz, relying on said statement to her financial detriment, did violate Article III of its collective

bargaining agreement with Complainant Association and thereby violated Section 111.70(3)(a)5 of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

1. That Respondent reimburse all teacher aides the amount of earnings they lost as a result of said Respondent's reduction of their daily work hours from six to three for the period January 17, 1972 up to, but not including, February 24, 1972.

2. That Respondent pay Mary Ann Kalamarz $31.75, which amount represents the sum of money she paid to continue her health insurance when she relied on Respondent's statement that all fringe benefits for teacher aides would be discontinued as of March 1, 1972.

Dated at Madison, Wisconsin, this 28th day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The initial complaint in this matter was filed with the Commission on May 12, 1972. Both parties filed initial briefs, and the Respondent filed a reply brief, which brief was received on November 27, 1972. The initial complaint stated that Respondent violated Article III of its collective bargaining agreement with Complainant when it reduced the number of hours teacher aides were to work, thereby violating Section 111.70 of the Wisconsin Statutes. At the hearing Complainant amended its complaint alleging Respondent caused teacher aide Mary Ann Kalamarz to pay $31.75 to obtain health insurance because she relied on Respondent's ascertion that all teacher aides would lose their fringe benefits as of March 1, 1972. This motion to amend the complaint was not objected to by the Respondent and was allowed by the Examiner.

FACTS

Respondent admits in its Answer that at all times material herein the Complainant and Respondent School District had been parties to a collective bargaining agreement. On November 30, 1971, Respondent's Fiscal Board adopted a school budget which contained a net reduction in said budget of $565,000. On January 3, 1972, Respondent's School Board approved the aforementioned reduction in the 1972 school budget in order to hold said budget within the monies approved by the Fiscal Board. On January 5, 1972, Respondent informed the Complainant that it intended to reduce the working hours of all teacher aides from six to three effective January 17, 1972. In addition, it notified Complainant that fringe benefits for teacher aides would be discontinued as of March 1, 1972. On January 17, 1972, the teacher aides did have their hours reduced as described above. However, on February 22, 1972, Respondent learned that its year end general fund surplus contained $350,000 in excess of what had been originally estimated. Therefore, effective February 24, 1972, all teacher aides returned to their regular daily six hour working schedule.

RESPONDENT'S POSITION

Respondent argues that the Fiscal Board has the sole power to approve the school budget and levy the general property tax for school purposes. 1/ Respondent points out that the Fiscal Board was not a party to the teacher aide agreement and that there was no evidence to indicate that said Board had ratified the agreement. It argues that when the Fiscal Board reduced the school's budget in November of 1971, the School Board was forced to operate within said budget. Specifically, Respondent contends that since the Fiscal Board was in no way a party to the agreement with Complainant, it did not have to concern itself in any way with the way in which budget reductions would be made by the Board of Education. It simply provided the Board of Education with $565,000 less in funds than said Board had requested.

1/ See West Milwaukee v. West Allis, 31 Wis. 2d, 397 (1965).

Respondent further argues that the word "normally" found in Article III, paragraph 1 where it states that teacher aides "normally will be employed for a minimum of six hours per day for the days that children are in school", means "ordinary", "customary" or "usual".

Additionally, Respondent contends that it has the ability to reduce working hours by virtue of Article VIII which grants to Respondent the right "to determine hourly and daily schedules of employment." In addition, the aforesaid Article states "Nothing in this Agreement . . . shall require the Board to continue in existence any of its present programs in its present form and/or location or on any other basis."

The Respondent avers that it would be incomprehensible for the parties to have agreed that management has the right to determine hourly and daily schedules of employment and the right to terminate programs without also having agreed that management has the right to cut the daily hours as otherwise "usually" provided for in Article III of the agreement.

Respondent further argues that external circumstances, changed conditions and subsequent developments surrounding the reduction in the school budget created a contractual defense of supervening impossibility thereby excusing its partial nonperformance of Article III of the agreement. Respondent emphasizes that it did not attempt to repudiate the entire agreement with the teacher aides but only that part of the agreement which appeared to be impossible to perform following the budgetary reduction by the Fiscal Board. Respondent contends that the hard fact facing it on January 3, 1972 was that there simply was insufficient money to perform that part of the agreement which provided that the daily hours for teacher aides would normally be six. That portion of the agreement, it argues, out of necessity was modified by reducing the teacher aides' daily hours.

COMPLAINANT'S POSITION

The Complainant argues that even assuming there was a need to cut expenditures, that it should not have been done in a manner that violated the contract that was currently in effect. It points out that the contract provided for a six-hour work day for teacher aides. It stresses that according to the contract if there had to be a cut back in the teacher aides' program, aides with less seniority were to be laid off and that there was no contractual provision allowing the Municipal Employer to reduce the scheduled hours on a regular basis.

The Complainant further argues that Respondent's actions regarding the teacher aides are not excused by impossibility of performance. It contends that basic contract law holds that for impossibility to operate as an excuse for nonperformance, said impossibility must be an objective impossibility whereby the promise in question is incapable of performance by anyone. Complainant avers that when a promised performance requires cooperation by third parties, the promisor assumes the risk that they will cooperate. Furthermore, Complainant points out that financial ability to pay the teacher aides for their normal six-hour day existed all along and hence there is no room for argument that it was impossible for Respondent to perform on its contract.

Complainant avers that the usage of the word "normally" in Article III which states that aides "normally will be employed for a minimum of six hours per day for the days that children are in school" means that which is "regularly or customarily done". Complainant contends that if the aides were scheduled for six hours a day and on a particular day the students were excused from class because of a snow storm, there would be a cut in the aides' hours for that day. However, Complainant argues that the instant case does not involve such circumstances as those described above but instead involve a general reduction of hours for the then remaining part of the 1972 school year and as such violated the specific provision calling for a minimum of a six-hour day.

Finally, Complainant contends that the management rights clause found in Article VIII of the contract does not allow Respondent to unilaterally cut the hours worked by the teacher aides. Specifically, Complainant stresses that the first part of Article VIII expressly limits the rights of management by the phrase "except as otherwise expressly provided in this agreement". Therefore, Complainant contends that the management rights expressed in Article VIII do not include the Municipal Employer's right to establish a work schedule of less than a minimum of six hours for the teacher aides.

Complainant, in its brief, argues for the first time that Respondent violated Section 111.70 of the Wisconsin Statutes by not negotiating with it concerning the implementation of its decision to reduce the work hours for teacher aides.

DISCUSSION

Respondent admitted in its Answer to the complaint filed in the instant matter that a contract was in existence for all times relevant. However, Respondent attempts to somehow obscure this fact by arguing that its Fiscal Board was not in any way a party to the aforementioned contract and that by some legerdemain that argument should vitiate the contract which it entered into. To allow one board of a municipal employer, in this case a Fiscal Board, to overturn a contract entered into by another board (the Board of Education) would wrack havoc with the collective bargaining process in municipal employment and is specifically rejected by the Examiner. 2/

The Examiner agrees with Respondent that the word "normally" used in Article III, paragraph 1, does mean the teacher aides customarily or usually "will be employed for a minimum of six hours per day." However, the use of this word seems to contemplate that there may be unusual temporary circumstance when teacher aides will not work their normal work schedule of six hours per day. Thus, if the school buses, for example, could not deliver the children to the school on a given school day until 12:00 noon due to severity of weather, the teacher aides would not work their normal six-hour day. However, the circumstances of the instant case involved an across the board decrease in

---

2/ See City of Racine, Decision No. 6242 (February 1963) where the Commission stated that a Municipal Employer should not be allowed to hide behind the shield of budget procedures thereby thwarting the operation of collective bargaining as well as frustrating the legislative intent in creating Section 111.70 of the Wisconsin Statutes.

hours of employment for an extended or protracted period of time. This sort of across the board reduction in force is specifically covered by Article III, paragraph 3 which states "if any teacher aide, instructional aide or orthopedic matron is hereafter employed on a normal hour basis less than that set forth in paragraph 1 or 2 above, whichever shall apply, such individual shall be terminated before there is any reduction in force of those employes in his classification who are covered by paragraph 1 or 2." (Emphasis supplied.) It is evident that Respondent by its actions was attempting to establish a schedule of employment for teacher aides for the remainder of the school year on a normal hour basis less than six. Thus, it is clear that the relatively permanent type of change in employment contemplated by the Municipal Employer (vis a vis an occasional change in hours due to a chance event) should have resulted in its terminating employes pursuant to the above quoted Article III, paragraph 3 and that it should not have reduced the hours of teacher aides from six to three.

The Examiner rejects Respondent's argument that it has the right under Article VIII to reduce the hours of the teacher aides. While Article VIII does specifically state that the Board has the right "to determine hourly and daily schedules of employment" this right is subject to the very first clause of said Article which states in pellucidly clear language that, "except as otherwise expressly provided in this agreement" thereby limiting the rights delineated in the remainder of Article VIII. Article III, paragraph 3 specifically and expressly describe the procedure to be followed if teachers are employed on a normal hourly basis less than six.

Respondent also contends that its action in reducing the number of hours teacher aides would normally work was justified in that a supervening impossibility made that part of its contract impossible to perform. It argues that the action of the Fiscal Board in 1971 of cutting the school budget amounted to such an external subsequent change in conditions that it made full performance of its contract with Complainant impossible. While the Examiner acknowledges the dilemma forced on the School Board by the Fiscal Board's action, such a financial development certainly does not excuse a party to a contract from performing as it has promised in said contract. It is a well settled principle of contract law that mere personal inability of a promisor to perform its contract obligations is no excuse for such nonperformance for this amounts to nothing more than subjective impossibility. The duty of performance is discharged only when a supervening event makes performance impossible by anyone. The rationale behind this principle is described in Simpson on Contracts, pages 360-361 where it states as follows:

". . .

> Subjective impossibility will never excuse a duty because the promisor by entering into the contract has assumed the risk of his ability to perform. It is no defence for a party who has promised payment on a certain day to say that it is impossible for him to perform because he hasn't the money and can't get it, or that a receiver has been appointed who has taken over his business, or that he is bankrupt and the trustee has his assets, or that business is bad and his wife's illness requires what funds he has. Nor is it a defence that the promisor's performance is prevented by some third person, either actively or through his refusal to cooperate, as in the case of a manufacturer's

failure to deliver goods on time due to a strike in his factory, or his failure to deliver goods at a distant point due to a shortage of freight cars. A seller's duty to deliver a stated quantity of molasses from a specified refinery is not excused by the fact that the factory reduced its output. All of these are no more than instances of subjective impossibility; they amount to no more than saying 'I cannot perform.'" (Emphasis supplied.)

Applying these principles of contract law to the instant case, it is clear that Respondent as promisor assumes the risk of its being able to perform and the fact that said performance was frustrated by its Fiscal Board certainly does not excuse its nonperformance. In addition, as the events subsequently unfolded, there certainly was not even subjective impossibility of performance being as the needed money was available but was not "discovered" until after Respondent erroneously decided it could not fully carry out its contractual responsibilities.

Finally, it necessarily follows that teacher aide Mary Ann Kalamarz be allowed to recover the $31.75 she was forced to pay in order to continue the health insurance coverage that she had prior to Respondent's temporary nonperformance of its contract in that it was Respondent's inappropriate reduction of teacher aides' hours which would have disqualified the aforementioned teacher aide from being eligible to participate in a group health insurance plan as she had prior to the reduction in hours. 3/

The Complainant, in its post-hearing brief, for the first time contended that Respondent failed to negotiate a reduction in hours for teacher aides as required by law. However, this issue was not raised in Complainant's complaint nor did it raise said issue at the hearing. In fact, the Complainant was allowed at the hearing to amend its complaint in order to include the Mary Ann Kalamarz incident described above but Complainant made no effort to amend its complaint to include the allegation of a refusal to bargain over the reduction in teacher aides' hours. Therefore, being as Complainant first raised the issue of improper bargaining in its brief, the Examiner will not treat it as a viable issue to be considered as part of his decision in the instant matter. 4/

Dated at Madison, Wisconsin, this 28th day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
John T. Coughlin, Examiner

3/ In order for a teacher aide to qualify for health insurance provided for in the contract, said aide had to work 600 hours per year.

4/ See General Electric Co. v. Wisconsin E. R. Board, 3 Wis. (2d) 227.