

"POLICIES OF THE BOARD OF EDUCATION

VI. Instruction

1. Elementary and secondary
- a. Schedules

- (2) School day

- (a) Length of school day

The regular school day for fulltime teachers shall be eight continuous hours within the 7 a.m. to 5 p.m. time span including a duty free lunch period. The school day will be flexible; starting and dismissal times may vary from school to school as determined by the Board of Education. Within this period of time, the instructional program shall be scheduled as described herein. The buildings are to be open for instructional purposes and for duties associated with instruction. The operational day shall end at 3:30 p.m. on days before special recesses. Such special recesses shall include WEA conventions, Thanksgiving, Christmas, NWEA conventions and Easter. On Fridays, teachers may leave the building five (5) minutes after student dismissal but at no time should this dismissal be beyond 4:00 p.m.

- (b) Instructional time

The minimum time for the length of the school day exclusive of lunch period shall be as follows:

-1- Kindergarten	150 minutes (each section)
-2- Grades 1 and 2	300 minutes
-3- Grades 3 and 4	330 minutes
-4- Grades 5 and 6	360 minutes
-5- Grades 7 and 8	360 minutes
-6- Grades 9 through 12	385 minutes

- (c) Plan of operation

All teaching personnel should be available in their places of operation (classroom, offices, etc.) in accordance with the above time schedule unless called elsewhere on official business for the schools. This is interpreted to include extracurricular activities and curriculum development programs. All special teaching personnel shall check in at the principal's office upon arrival and shall notify the principal when leaving before the scheduled time. Teaching personnel should be available to participate in the program of the school system after the operational day.

- (d) Schedule for teachers of the mentally retarded

Teachers of the mentally retarded shall have as their regular operational hours the same as scheduled and in operation for the respective schools.

The Board of Education retains the right to establish the schedule for the school day. However, the Sheboygan Education Association shall be notified in advance of any changes in schedule and shall be given an opportunity to discuss the matter and make recommendations."

"ARTICLE VI

. . .

D. Grievance Procedure -- Grievances shall be processed in accordance with the following procedure:

. . .

4. Step Four -- Arbitration

a. If the grievance is not resolved in Step Three, either the Board of Education or the Sheboygan Education Association shall have the right to appeal the dispute to an impartial arbitrator appointed by the Wisconsin Employment Relations Commission. Such request for arbitration shall be made within ten (10) school days after the completion of Step Three.

. . .

g. If either party disputes the arbitrability of any grievance under the terms of this Agreement, the arbitrator shall have no jurisdiction to act until the matter has been determined by a court of competent jurisdiction. When an arbitrator finds a dispute before him not to be arbitrable, it shall be referred back to the parties without decision or recommendation on its merits."

2. That paragraphs 3 and 4 of the Examiner's Conclusions of Law are reversed, and that a new paragraph 3 shall be, and hereby is, incorporated into the Conclusions of Law as follows:

"3. That the Complainant, Sheboygan Education Association, by agreeing with the Respondent, Board of Education, Joint School District No. 1, City of Sheboygan, et al., to the terms of the collective bargaining agreement in existence at all times material herein, and specifically to Articles II, III, IV, VII and VIII thereof, effectively waived the Complainant's right, and the Respondent's duty, to collectively bargain with respect to

- a. the Respondent's decision to reduce the size of its teaching staff;
- b. with respect to the impact of said decision;
- c. with respect to the Respondent's failure to process grievances with regard to such decision and/or the impact thereof; and
- d. with respect to the Respondent's refusal to provide the Complainant with information relating to said decision and the impact thereof;

and, therefore, the Respondent did not commit, and is not committing, any prohibited practices within the meaning of Sec. 111.70(3)(a)(4)

and/or (1), or any other subsection of Sec. 111.70(3)(a) of the Municipal Employment Relations Act."

3. That the Order issued by the Examiner is hereby reversed and that the Order shall be, and hereby is now, as follows:

IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this *8th* day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Vernan Torosian
Vernan Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S
FINDINGS OF FACT, PARTIALLY REVERSING EXAMINER'S CONCLUSIONS
OF LAW AND FULLY REVERSING EXAMINER'S ORDER

The Pleadings: 1/

The Complainant, hereinafter referred to as the SEA, in its amended complaint alleged in material part, by (1) refusing to negotiate with the SEA concerning a layoff procedure in the event the District might experience a budget reduction requiring such layoff; (2) refusing, upon the request of the SEA, to furnish information, relevant and necessary to intelligently represent all the teachers in the bargaining unit, pertaining to the reasons for Respondent's, hereinafter referred to as the District, decision to reduce its teaching staff, the identity of the teacher's affected thereby ask the specific reasons for the non-renewal of each of the teachers involved; (3) upon request, refusing to negotiate with the SEA concerning said decision and the implementation of such decision; and (4) refusing to consider the non-renewal of teachers, resulting from such decision, at informal conferences with said teachers and representatives of SEA, and the continued refusal to furnish said teachers and the SEA any information concerning the reasons said teachers were being considered for non-renewal; that the District denied employees the right to be represented pursuant to Section 111.70(2) of MERA, and, further thereby interfered with the rights of employees and refused to collectively bargain with SEA in violation of Sections 111.70(3)(a)1 and 4 of MERA.

In its answer to the amended complaint, the District, in material part, denied those allegations set forth in (1) and (3). The District admitted that it did indicate to the teachers involved that they were being considered for non-renewal because of non-availability of teaching positions. The District denied that it violated any sections of MERA, and further in its answer the District alleged, as an affirmative defense, that the decision to non-renew teachers was not subject to collective bargaining or the grievance procedure of the existing collective bargaining agreement on the basis of Article II, VII and VIII thereof, and further, that the teachers involved, invoked those provisions of the agreement set forth in Article VII of the Agreement.

FACTS:

Neither parties raised any issue as to the facts as found by the Examiner. However, the Commission deems that the District's policy 6112, referred to in Article IV, should be, as has been, incorporated in the Findings of Fact as a material provision of the collective bargaining agreement.

DISCUSSION:

The Examiner's Conclusions of Law and Order, to which the District takes exception in its petition for review, is set forth in the preface to the Commission's formal determination herein. The Examiner concluded that in its brief the District abandoned its defense based on the so-called "zipper" clause. The District, in its petition for review,

1/ Enlarges discussion thereon in Examiner's Memorandum.

in support of its contention that the Examiner failed to find that the SEA, in Article VII waived its right to negotiate concerning the effects of the District's layoff decision, argues that said Article constituted a portion of the evidence and cannot be ignored. We agree with the District in that regard, since the rights and duties of the parties herein rise or fall on the interpretation of the material provisions of the collective bargaining agreement. It's interesting to note that the SEA, in its brief filed in reply to the petition for review, does not contend that the District "waived" the effect of the "zipper" clause in Article VIII. The SEA, in such brief, contends that such clause cannot possibly be interpreted to justify "a waiver of the effect and impact of a reduction in staff."

The Commission therefore deems it essential to the disposition of the issues raised in the instant proceeding to consider and interpret the effect of Article VIII, along with the other pertinent articles of the collective bargaining agreement.

Article II grants to the District the right, in accordance with applicable laws, to, among other things, "lay-off employees in the event of lack of work or funds . . .", and said Article further provides that the "exercise of the foregoing powers, rights . . . shall be limited only by the specific and express terms" of the collective bargaining agreement, and "in conformance with the . . . laws of the State of Wisconsin . . ."

Article III C.1. provides that the District "retains the right to make grade, subject and activity assignments and to make transfers between schools as necessary in the best interest of the district."

The material portions of Article IV are recited in para. A.1., as follows: "The application of policy 6112 shall be subject to the Grievance Procedure. Said policy shall remain unchanged for the life of this contract absent agreement by the Sheboygan Education Association", and in paragraph B. as follows: "The Board will make every reasonable effort to conform with the class size policy in effect."

Policy 6112 incorporated in the collective bargaining agreement by reference, as noted in the Findings of Fact, sets forth under, "School Day", the length thereof, instructional time, plan of operation, and schedule for teachers of the mentally retarded. It also contains the following significant language: "The Board of Education retains the right to establish the schedule for the school day. 2/ However, the Sheboygan Education Association shall be notified in advance of any changes in schedule and shall be given an opportunity to discuss the matter and make recommendations." 3/

Article VI, relating to the grievance procedure, defines a grievance "as any alleged violation of a specific provision or provisions" of the collective bargaining agreement.

Article VII specifically provides that teacher non-renewals "shall not be subject to the grievance procedure", but it requires the Board to "follow the procedures as outlined in Wisconsin Statute 118.22". The Article also permits the teachers involved to be represented by

2/ Emphasis added.

3/ Emphasis added.

"representatives" of their own choosing at the private Board conference with regard to the preliminary notice of non-renewal.

Article VIII D. contains the so-called "zipper" clause. The language therein characterizes the collective bargaining agreement as representing "the full and complete agreement". It sets forth that during the term of the agreement "any matters . . . whether or not referred to therein shall not be open for negotiations", and further, "all terms and conditions of employment not covered by this agreement shall continue to be subject to the Board's direction and control", subject to notification to the SEA prior to any changes in such terms and conditions of employment "having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter."

The SEA argues that the so-called "zipper" clause does not contain an explicit and specific statement of the waiver of the SEA's right to bargain, and the District's duty to bargain with respect to the impact of its reduction in staff, or the District's duty to process grievances concerning same, or its duty to provide the SEA the information relevant and necessary to properly represent employees in the bargaining unit. In support thereof the SEA cites previous Commission, NLRB, and court decisions.

CONCLUSIONS:

We agree with the Examiner's conclusion that the collective bargaining agreement granted the District the unilateral right to reduce its teaching staff as a result of a lack of funds, and therefore the District, during the term of the agreement, was under no duty to negotiate with the SEA concerning such decision. While, in his Memorandum the Examiner concluded that the District has abandoned the "zipper" clause defense, and that "no specific determination need not be made as to its effect on the issues involved", the Examiner nevertheless states his interpretation of the portion of the Article containing the phrase " . . . that the (bargaining agent) shall be notified in advance of any changes having a substantial impact in the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter." We agree with the Examiner that the proposed reduction in staff involved herein had a substantial impact on the bargaining unit. As indicated in paragraph 7 of the Findings of Fact, the Examiner found, and we agree, that the parties on February 15 discussed the budget reduction, and the possibility of staff reductions, that the District refused to negotiate on procedures for the selection of teachers for layoff, changes in existing policies on the school day and class size. The District's refusal to negotiate on said matters was premised on the contention of the District that such matters were not negotiable in light of the various provisions of the collective bargaining agreement noted herein.

We conclude that by the terms of the collective bargaining agreement the SEA did, with sufficient clarity, waive its right and the District's duty, to negotiate with respect to the impact of the District's decision to reduce its teaching staff. The intent to so waive is buttressed by the language in Article VIII B. granting the SEA advance notice of any "changes having a substantial impact on the bargaining unit, given the reason for such change and provided an opportunity to discuss the matter." We do not interpret the term "opportunity to discuss" as requiring bargaining. On the contrary, said term strongly supports a waiver of such statutory duty.

With respect to the District's refusal to process the grievance concerning the District's failure to negotiate a layoff procedure and

changes in the teacher work day, 4/ it is clear by the material provisions of the agreement, that the SEA's statutory or contractual rights relating thereto were effectively waived by the SEA.

In support of his conclusion that the District refused to bargain by not furnishing to the SEA information necessary to function in its representative capacity, the Examiner relies on his determination that the District waived the effect of the "zipper" clause. We have concluded that there was no such waiver. However we do not deem our conclusion as necessarily resolving the legal issue involved, since Article VIII does provide the SEA with the opportunity to discuss impact of changes, resulting from permissible unilateral determinations made by the District. The query then arises "Is there an enforceable statutory duty on the District to furnish information to SEA to properly represent unit employes in discussions with respect to changes resulting from the reduction of teaching personnel having a substantial impact on the bargaining unit?"

Since the SEA has waived its right to bargain on the impact of the non-renewals, and since Article VIII provides that the SEA be given a reason for changes resulting from such impact, and provided with an opportunity to discuss the matter, the failure of the District to furnish the SEA with information as to the reasons for such changes for only discussing the matter, is not violative of any statutory right, but might very well be grievable under the contractual grievance procedure, an issue not raised in this proceeding.

Dated at Madison, Wisconsin this 8th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

4/ The SEA in its amended complaint, does not seek an order requiring the District to comply with the grievance procedure, nor does the record reveal that the SEA sought a court determination of the arbitrability of the matters grieved as provided in the agreement. We wish to note that we disagree with the Examiner's conclusion of Law that failure to process a grievance constituted a refusal to bargain. Such refusals, unless other procedures are provided in a collective bargaining agreement, involve a possible violation of the agreement, a prohibited practice set forth in Sec. 111.70(1)(a)5 of WERA.