STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NICOLET EDUCATION ASSOCIATION, Complainant, vs. JOINT UNION HIGH SCHOOL DISTRICT NO. 1 SCHOOL BOARD, Respondent.	Case V No. 17050 MP-268 Decision No. 12073-B

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing on behalf of the Complainant.
Hayes and Hayes, Attorneys at Law, by Mr. Tom E. Hayes, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a Complaint with the Wisconsin Employment Relations Commission on August 1, 1973, alleging that the above-named Respondent committed prohibited practices within the meaning of the Municipal Employment Relations Act, MERA (Secs. 111.70 et seq., of the Wisconsin Statutes); and said Commission having appointed Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue findings of fact, conclusions of law and orders in the matter as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act, made applicable to municipal employment by Sec. 111.70(4)(a) of MERA; and the Examiner, upon notice to the parties, having conducted hearing in the matter on September 17, 1973; and following the close of the hearing, and on January 18, 1974, Respondent having filed a Motion with supporting document requesting dismissal of the Complaint ". . . on the ground that the proceeding has been made moot by the actions of the parties since the time of the filing of the Complaint therein"; and the Examiner having denied said Motion to dismiss by Order dated April 8, 1974; and the parties having thereafter filed post-hearing briefs the last of which was received on May 6, 1974; and the Examiner having considered the evidence and the arguments and briefs of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Nicolet Education Association, referred to herein as Complainant, is a labor organization with its principal office located at 6701 North Jean Nicolet Road, Milwaukee, Wisconsin, 53217.

2. That Joint Union High School District No. 1 School Board, referred to herein as Respondent, is a municipal employer in that it has, in all respects material hereto, acted within its authority to operate Nicolet High School on behalf of Joint Union High School District No. 1, a municipal employer; that Respondent and said District have their principal offices located at 6701 North Jean Nicolet Road, Milwaukee, Wisconsin, 53217; that said District is also known as Nicolet High School Joint Union High School District No. 1.

3. That Respondent, on behalf of said District, operates a high school for some 2000 District residents and tuition-paying nonresidents up to approximately age 18 during a period beginning in late August or early September and ending in mid-June, such period being referred to herein as the school year; that Respondent also operates a summer school program providing classes of varying length up to eight weeks between mid-June and mid-August and serving approximately 700 District residents and tuition-paying nonresidents which student population is almost exclusively 18 years of age or younger; and that Respondent also offers certain recreational classes during evenings, September-May, primarily to adults, as part of a program of adult education and recreation jointly sponsored by Respondent and the Milwaukee Area Technical College.

4. That Respondent's school year high school program employs approximately 135 teachers including guidance counselors; that Respondent employs all seven of its guidance counselors for one week shortly following the close of each school year and an additional week immediately prior to the opening of the succeeding school year for report closing and preparations for incoming students, respectively, and employs at least one school year counselor at a time, for short periods of time each, to serve as "counselor on duty" throughout the nonschool year period; that Respondent offers summer school courses in any subjects in which sufficient student interest is expressed and about one-third of the summer school courses offered are not a part of the school year curriculum; that summer school teachers are selected by Respondent's summer school coordinator from among Respondent's school year faculty and from persons employed elsewhere during the school year; that of the forty summer school teachers ordinarily employed by Respondent, approximately ten have

not been employed as teachers by Respondent during the school year; that such summer teachers not employed by Respondent during the school year have been reemployed over the period 1971-1973 (inclusive) so consistently that they have a reasonable expectation of returning to Respondent's employ in the subsequent summer; and that while Respondent issues written individual teaching contracts to its school year teachers covering their school year employment, it enters into only verbal contracts with its summer school teachers.

5. That at all times material hereto Complainant has been the certified collective bargaining representative of:

> "All regular full-time and regular part-time teachers in the employ of Nicolet High School Joint Union High School District No. 1, excluding the Superintendent, business manager, principal, administrative assistants, athletic director, curriculum coordinator, director of guidance, director of recreation and adult education, and nurse".

6. That at all times material hereto and since at least October 1, 1972, Complainant and Respondent have been parties to a collective bargaining agreement, referred to herein as the Agreement; and that the Agreement provides in pertinent part as follows:

"AGREEMENT

. . .

ARTICLE I - Management Rights

The Board, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the law and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

. . .

(5) To determine class schedules, the hours of instruction, and the duties, responsibilities, and assignments of teachers and other employees with respect thereto, and with respect to administrative and non-teaching activities, and the terms and conditions of employment.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

ARTICLE II - Association Rights

The Board recognizes the Association as the exclusive and sole bargaining representative for the teaching staff of Nicolet High School as certified by the W.E.R.C. . . .

. . .

ARTICLE IX - Salary Schedule

The following teacher salary schedule shall apply to the 1972-73 school year:

Step	B.A.	BA + 15	M.A.	MA + 15	MA + 30	Ph.D.
1	7,975	. . .	. . .	. . .	. . .	9,175
. . .	. . .					
15						18,300

. . .

ARTICLE XI - Teacher Retirement Fund Contributions

The School Board will make the following teacher contributions to the State Teachers Retirement Fund on total gross teaching earnings beginning with the September 25, 1972 payroll check. Teaching earnings is defined as school year contractual earnings, summer school teaching income, coaching, Adult Education and Recreation teaching and extra-curricular assignments as listed on Appendix B of this Agreement. [Emphasis supplied]

4 1/2% - All teachers

. . .

ARTICLE XXI - Reopener Clause

Either party may notify the other party in writing at least sixty (60) days prior to March 15, 1973 and March 15, 1974 of its desire to change the Agreement in the second and third years respectively, with regard to the salary schedule, health insurance contribution, number of contract days, ECAR committee recommendations, and Joint Committee recommendations as listed in Article III. Upon receipt of such notice, the parties will meet and negotiate any proposed changes to any of these areas as designated.

. . .

ARTICLE XXIII - Term and Scope of Agreement

This Agreement shall remain in full force and effect for the period commencing September 1, 1972 and ending August 31, 1975. This Agreement contains the entire agreement between the parties and supersedes all previous agreements, policies and contracts and disposes of all issues subject to negotiation, whether presented or not, except the handling of grievances as provided in Article XVII.

After agreement has been reached, there will be no re-opening of negotiations for the period of this agreement except as stated above and ih Article XXI - Reopener Clause.

ARTICLE XXIV - Validity

It is understood by the Board and the Association that this Agreement is accepted in its entirety.

. . .

The Association and the Board agree to negotiate during the 1972-73 and 1973-74 school year at a date mutually agreed upon for the 1973-74 and 1974-75 Agreement for only those items provided for in Article XXI.

. . .

EXHIBIT D

Nicolet High School

1972-73 School Calendar

[herein is provided a two semester school year beginning August 28, 1972 and ending June 15, 1973]"

7. That those of Respondent's summer school teachers not employed by Respondent during the school year are regular part-time employes within the meaning of the Certification noted in Finding No. 5 above and of Article II of the parties' 1972-75 agreement noted in Finding No. 6 above; that those of Respondent's summer school teachers who are employed by Respondent during the school year are regular full-time or regular part-time teachers within the meaning of said Certification and said Article II; and that the guidance counselors employed by Respondent during the nonschool year period, being also employed during the school year period, are either regular full-time or regular part-time teachers within the meaning of said Certification and said Article II.

8. That for at least eight summers preceding 1973, both summer school teachers and summer counselors were paid an amount equal to the salary per contract teaching day applicable to their experience and training, as set forth on the salary schedule of the school year immediately preceding the summer of their employment, for each six-hour day (or a prorated portion of such daily rate for a shorter day) of work they performed for Respondent.

9. That in late October or early November 1972, acting upon rumors that Respondent was contemplating changes in the mode of compensation of nonschool year (i.e., summer) teachers (including counselors) representatives of Complainant presented written and oral demands to Respondent, during a regular meeting thereof, that Respondent "negotiate a contract for the Summer School of 1973" with Complainant.

10. That thereafter, Respondent replied to said demands by letter to Complainant dated November 9, 1972 indicating, inter alia, that "[i]t is not presently clear to us as to whether [summer school wages] is a negotiable item and we have asked our attorneys to study the contract and give us an opinion on the matter."

11. That thereafter, Complainant sent to Respondent a letter dated December 4, 1974 the body of which read as follows:

> "The Nicolet Education Association's negotiating committee is notifying you that it desires to meet with you to negotiate the following items for the 1973-74 school year; the number of contract days (calendar), health insurance contribution, ECAR committee recommendations, salary schedule, summer school negotiations for 1973, and Joint Committee recommendations.
>
> Since it is necessary to establish a school calendar early in the year, we would like to meet with you within the next three weeks to go over the proposed calendars."

12. That thereafter, by letter dated December 11, 1972, Respondent replied to Complainant that it was prepared ". . . to begin negotiations [on January 15, 1973] under provisions of our contract with your organization."

13. That thereafter, by letter to Respondent dated December 12, 1972, Complainant replied as follows:

> "As suggested in your letter of December 11, 1972 the Negotiation Committee of the Nicolet Education Association will be glad to meet with your representatives on January 15, 1973 at 7:30 P.M.
>
> We would again like to call your attention to the fact that we have also requested to negotiate for the Summer School as well as the other items for the next school year. In answer to our earlier letter you refused this request as not being included in the reopener. There is no need for this item to be in the reopener in as much as it has never been negotiated before and the negotiated part of the school year runs from August 26, 1972 to June 15, 1973 according to our present contract. We view the Summer School as something that has never been under the present contract, so therefore it is wide open for negotiations.
>
> We, too, are looking forward to meeting with you and hope that we can promptly resolve the items in question."

14. That on January 15, 1973, bargaining representatives of Complainant and Respondent met; and that Respondent's representatives took the position at that time that the summer teacher compensation was not a negotiable item.

15. That representatives of Complainant and Respondent had another negotiation session on March 12, 1973; that on that occasion, Complainant's representatives reiterated their demand that Respondent bargain with them concerning the wages, hours and conditions of employment of summer teachers for 1973; that Respondent's representatives refused to do so and suggested that Complainant seek a declaratory ruling on the question; and that Respondent's representatives also announced to Complainant at that meeting that Respondent had decided to base 1973 summer teacher compensation on the 1971-72 salary schedule rather than on that of the school year immediately preceding, i.e., 1972-73.

16. That representatives of Complainant and Respondent had another negotiation session on April 30, 1973 during which Complainant's representatives buttressed their request for bargaining concerning summer teachers with an opinion of their legal counsel that such was a mandatory subject of bargaining within the meaning of Sec. 111.70 of the Wisconsin Statutes; and that Respondent's representatives replied that they disagreed with said opinion.

17. That during the summer of 1973, Respondent employed summer school teachers and counselors in a manner and in numbers similar to its employment of such employes in previous summers; that in 1973, Respondent paid summer school teachers and counselors, insofar as their "counselor on duty" work is concerned, on the basis of the 1971-72 salary schedule; that such 1973 mode of payment of summer teachers (including counselors) constituted a change in Respondent's longstanding practice and policy of basing such compensation on the salary schedule of the school year immediately preceding the summer in question; that said change in practice and policy affected the wages received by summer teachers (including counselors) in Respondent's employ which employes were represented for collective bargaining by Complainant; and that said change was effected unilaterally and without prior collective bargaining concerning same with Complainant.

18. That Articles I, XXIII and XXIV of the parties' 1972-75 Agreement, noted in Finding No. 6 above, constitute a waiver of Respondent's and Complainants' rights and obligations to further collectively bargain concerning, inter alia, the subject of the 1973 wages, hours and conditions of employment of summer school teachers and counselors in Respondent's employ for the summer of 1973; that neither Article XXI of said Agreement nor any other provision of said Agreement constitutes an exception to said waiver such as would impose upon Respondent and Complainant the right and obligation to bargain collectively concerning the

1973 wages, hours and conditions of employment of summer school teachers and counselors in Respondent's employ for the summer of 1973.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That by reason of Complainant Nicolet Education Association's certification as the exclusive representative of all regular full-time and regular part-time teachers in the employ of Nicolet High School Joint Union High School District No. 1, excluding the Superintendent, business manager, principal, administrative assistants, athletic director, curriculum coordinator, director of guidance, director of recreation and adult education, and nurse, Complainant Nicolet Education Association has been, at all times on and after December 27, 1967, the exclusive representative of such teachers in the employ of Respondent Joint Union High School District No. 1 School Board during, inter alia, periods beginning immediately after the termination of the high school school year and ending immediately prior to the beginning of the succeeding high school school year; and that, as such, the Complainant Nicolet Education Association was the exclusive bargaining representative of guidance counselors and summer school teachers in the employ of Respondent Joint Union High School District No. 1 School Board during such summer period in 1973.

2. That prior to the mutual ratification of the 1972-75 collective bargaining agreement between Complainant Nicolet Education Association and Respondent Joint Union High School District No. 1 School Board, said parties had the correlative right and duty to bargain collectively within the meaning of Secs. 111.70(1)(d) and (2) of the Municipal Employment Relations Act with respect to the 1973 wages, hours and conditions of employment of summer teachers (including guidance counselors) in said Respondent's employ for summer, 1973; but that by agreeing to the terms of said 1972-75 collective bargaining agreement, and specifically to Articles I, XXIII and XXIV thereof, the Complainant Nicolet Education Association waived its right and Respondent Joint Union High School District No. 1 School Board's obligation to collectively bargain further with respect to the 1973 wages, hours and conditions of employment of summer teachers (including guidance counselors) in said Respondent's employ for summer, 1973.

3. That, therefore, by refusing, during the term of its 1972-75 collective bargaining agreement with Nicolet Education Association and

specifically on January 15, March 12 and April 30, 1974, to bargain with Complainant Nicolet Education Association concerning the 1973 wages, hours and conditions of employment of summer teachers (including guidance counselors) in its employ for summer, 1973, Respondent Joint Union High School District No. 1 School Board did not commit and is not committing either a refusal to bargain collectively or a prohibited practice in violation of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act.

4. That by unilaterally changing the method of wage computation of summer teachers (including guidance counselors) represented by Complainant Nicolet Education Association, effective in summer, 1973, without prior bargaining concerning such change with said Complainant, Respondent Joint Union High School District No. 1 School Board did not commit and is not committing either a refusal to bargain collectively or a prohibited practice in violation of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

That the Complaint in the above matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 31st day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

JOINT UNION HIGH SCHOOL DISTRICT
NO. 1 SCHOOL BOARD
Case V Decision No. 12073-B

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant, in its Complaint, alleged that Respondent, during the term of the parties' 1972-75 agreement (1) refused, upon request, to bargain about the wages of teachers (including guidance counselors) employed during the summer of 1973 and (2) unilaterally changed its longstanding past practice concerning the method of determining such wages (so as to reduce the levels of 1973 summer teacher wages below what otherwise would have been the case had the practice not been changed) without bargaining with Respondent concerning same, thereby allegedly committing refusals to bargain in violation of Sec. 111.70(3)(a)4 of WERA.

By way of answer, Respondent averred that Complainant represents only teachers employed by Respondent during the regular school year, not those employed during summers; that the parties' 1972-75 Agreement constitutes a waiver of bargaining with respect to the subjects of wages, hours and working conditions not set forth therein or reserved for reopening thereby; and that the reopener clause in said Agreement does not cover teacher wages for summer employment.

Following hearing in the matter Respondent filed a Motion requesting that the Complaint be dismissed on the ground that the proceeding has been made moot by the actions of the parties since the time of the filing of the Complaint, and more specifically by the parties' submission of the subject of 1973 summer teacher wages to final and binding fact finding. The Examiner denied said Motion, in an Order dated April 6, 1974, concluding that it had ". . . not been satisfactorily established that the parties have either adjusted or submitted to final and binding fact finding the issues joined by the parties . . ." herein. [1/]

The evidence is clear that Respondent refused to bargain about 1973 summer teacher wages, hours and working conditions when requested to do so by Complainant on more than one occasion during the term of the parties' 1972-75 Agreement. It is also clear that Respondent, without bargaining with Complainant on the subject, changed its longstanding practice and policy concerning summer teacher wages so as to reduce the

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[1/] Fact Finder David Johnson issued final and binding recommendations to the instant parties on a number of subjects in an Award dated May 7, 1974.

amounts of such wages from what they would have been had the practice and policy remained intact. On the matters of substantial dispute between the parties, they take the following respective positions.

POSITION OF THE COMPLAINANT

Complainant argues that it has been, at all material times, the exclusive representative of summer teachers (including guidance counselors), based both on the language of the certification and the community of interests shared by such teachers and Respondent's regular full-time and regular part-time school year teachers; that the Examiner should declare such representative status in order to avert subsequent disputes on the same question; that the 1972-75 Agreement does not constitute a waiver of bargaining by Complainant with respect to 1973 summer teacher compensation since ". . .[i]t would appear that the re-opener clause of the contract is such as to permit the negotiations of the salaries for the summer school teachers"; that the Examiner should find that Respondent refused to bargain about a mandatory subject and then made unilateral changes therein, all in violation of Sec. 111.70(3)(a)4 of MERA; and that the Examiner should order Respondent to cease and desist from such conduct and to make the 1973 summer teachers whole for the difference between what they were actually paid and what they would have received had their method of wage computation not been unlawfully unilaterally changed by Respondent.

POSITION OF THE RESPONDENT

Respondent argues that it had no duty to bargain with Complainant concerning wages, hours and working conditions of summer teachers in its employ because:

1. Complainant was not the representative for summer teachers since such teachers do not share a community of interests with school year teachers; or,

2. Even if Complainant represented such employes at the time it demanded to bargain about their wages, hours and working conditions, Complainant had, prior thereto, waived its right and Respondent's duty to bargain with respect to summer teachers and about their wages, hours and working conditions when Complainant agreed to the 1972-75 Agreement--specifically to, inter alia, Articles I (Management Rights) and XXIII (Term and Scope of Agreement).

In addition, Respondent argues that Complainant seeks herein a punitive remedy; that Complainant had the opportunity to submit its contentions

to binding fact finding as it had submitted, inter alia, the subjects of 1974 and 1975 summer teacher compensation; that public policy requires that Complainant not be permitted to ignore such an opportunity for resolution of 1973 summer teacher wages on the merits "by quasi-judicial means" and to continue to seek, instead, a punitive remedy herein.

DISCUSSION

Scope of Bargaining Unit and of Duty to Bargain

The parties' recognition clause in effect incorporates by reference Complainant's Certification [2] as representative of

> ". . . all regular full-time and regular part-time teachers in the employ of Nicolet High School Joint Union High School District No. 1, excluding the Superintendent, business manager, principal, administration assistants, athletic director, curriculum coordinator, director of guidance, director of recreation and adult education, and nurse."

Such language is a clear and unambiguous delineation of the scope of the bargaining unit represented by Complainant. It is undisputed herein that school year guidance counselors are included within said unit description. It is also clear and unquestioned that virtually all, if not all, of the summer school teachers who are also school year teachers for the Respondent are also included within said unit description.

For counselors and other teachers employed by Respondent during the school year, the differences between their school year and their summer duties and responsibilities in no way support the conclusion that such employes are not ". . . teachers in the employ of Respondent . . ." when serving in their capacities as summer counselors, "counselors on duty" or summer school teachers. Thus, the wages of such summer teachers (including guidance counselors) is clearly a mandatory subject between Respondent (their employer) and Complainant (their exclusive representative). [3] That conclusion is not altered by the fact that such employes work for Respondent a number of weeks in excess of the work year of a majority of the members of the bargaining unit.

For those summer school teachers employed elsewhere during the school year, employment with Respondent is only seasonal in nature. Nevertheless,

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[2] Decision No. 8274 (12/67).

[3] Sections 111.70(1)(d), (2), (3)(a)1 and (3)(a)4 of MERA.

the historical consistency of their return to Respondent's employ summer after summer during the period 1971-73 (inclusive) is sufficient to properly categorize such employes as "regular part-time teachers" within the meaning of the instant Certification [4] regardless of the actual number of weeks worked for Respondent per summer. [5] Since their positions fall within the instant bargaining unit description, such summer school teachers' wages, hours and working conditions are also mandatory subjects of collective bargaining between Complainant and Respondent. [6]

Respondent is likely correct in its assertion that the interests of summer-only teachers or of summer teachers as a group differ in some respects from the interests of the majority of unit teachers who do not work for Respondent during the summer. No doubt, the particular interests of such summer-only teachers or of summer teachers as a group receive less attention and have less weight in bargaining with Respondent than would be the case if a separate unit consisting exclusively of, e.g., summer teachers had been established. Nonetheless, a sufficient community of interests exists among summer and nonsummer teachers to compellingly justify their having been included in a single unit. Such is even more true today than was the case in 1967 when the instant unit was established in view of the antifragmentation mandate added in Sec. 111.70(4)(d)2.a. to the municipal act in 1971. [7]

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[4] See, e.g., Joint School District No. 3 of the City of Oconomowoc, Dec. No. 10388 (6/71); Stevens Point Board of Education, Dec. No. 7713 (8/67) (reasonable expectation of return warrants part-time status).

[5] See Joint School District No. 1, Hurley, Dec. No. 9458 (1/70).

[6] See note 3 above.

[7] Section 111.70(4)(d)2.a. reads as follows:

"111.70(4) POWERS OF THE COMMISSION.

. . .

(d) Selection of representatives and determination of appropriate units for collective bargaining.

. . .

2.a. The commission shall determine the appropriate bargaining unit for the purpose of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employes concerned to determine, by

(continued on page 14)

Waiver

It has been previously stated that the waiver by a party of the right to bargain on a mandatory subject of bargaining ought not be readily inferred; that such waivers must be "clear and unmistakable" and ". . . based upon specific language in the agreement or history of bargaining." 8/

In the instant Agreement, the parties agreed in Article I (Management Rights) that "The Board . . . hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and of the United States including . . . the right: . . . (5) To determine . . . the terms and conditions of employment . . . [and that] . . . [t]he exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement . . .". The parties further agreed that their 1972-75 ". . . Agreement contains the entire agreement between the parties and supersedes all previous agreements, policies and contracts and disposes of all issues subject to negotiation, whether presented or not, except the handling of grievances as provided in [the Agreement grievance procedure] . . . [and that] . . . there will be no re-opening of negotiations for the period of this agreement except as stated above and in Article XXI - Reopener Clause." 9/ Those clauses, read together, yield the conclusion that the parties reserved to Respondent the right to determine in its exclusive discretion, inter alia, the wages, hours and conditions of employment of summer teachers (including guidance counselors) for 1973 so long as such determination was not inconsistent with the express provisions of the 1972-75 Agreement. In addition, those

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7/ (continued from page 13)

secret ballot, whether or not they desire to be established as a separate collective bargaining unit. The commission shall not decide, however, that any unit is appropriate if the unit includes both professional employes and nonprofessional employes, unless a majority of the professional employes vote for inclusion in the unit. The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the unit. Any vote taken under this subsection shall be by secret ballot." [Emphasis added]

8/ See, e.g., City of Brookfield, Dec. No. 11406-A (7/73).

9/ 1972-75 Agreement, Article XXIII (Term and Scope of Agreement), supra Finding No. 6, above. See also, Article XXIV set forth in Finding No. 6.

clauses are a clear and unmistakable expression of mutual intent in sufficiently specific contract language to constitute an effective waiver of collective bargaining about such subject for the term of the 1972-75 Agreement. [10] That conclusion is buttressed by the fact that the 1972-75 Agreement contains at least one express provision concerning "summer school teaching", to wit, Article XI. [11] Thus, unless it can be said that the 1973 wages, hours and conditions of employment of summer teachers (including guidance counselors) for 1973 was a subject reserved for bargaining by the Reopener Clause (Article XXI), it must be concluded that Respondent was not subject to a duty to bargain with respect thereto.

Article XXI (Reopener Clause) reserves for reopening only proposed changes in the Agreement ". . . with regard to the salary schedule, health insurance contribution, number of contract days, ECAR committee recommendations, and Joint Committee recommendations as listed in Article III." Since there is no evidence that recommendations of either the ECAR or Joint Committees had any connection with the 1973 summer teacher wages, hours and conditions of employment at issue herein, only the ". . . salary schedule . . ." item for reopening appears even conceivably related to the wages for summer teachers. But even if the liberal standard of interpretation appropriate in determining the scope of an exception to a clear and unmistakable waiver of bargaining provision is applied, the Examiner cannot find that Article XXI reserved for bargaining the 1973 summer teacher wages. The ". . . salary schedule . . . reference appears compellingly to relate exclusively to changes in Article IX (Salary Schedule). For not only is the title of that Article identical to the subject reserved for reopening, but Article IX on its face calls for reopening since it provides that ". . . [t]he following teacher salary shall apply for the 1972-73 school year . . .", leaving the salary schedule for the two subsequent years of the 1972-75 Agreement for future bargaining. Moreover, the "salary schedule" following that introductory sentence is simply a cross-indexed set of numbers without any reference whatever to summer school or summer guidance counselors and their compensation. Instead, it is necessary to go beyond the 1972-75 Agreement to a policy and practice of Respondent to determine the nature and mode of computation of summer teacher wages.

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[10] Compare LeRoy Machinery Co., 147 NLRB No. 140, 56 LRRM 1369 (1964) (management's rights clause sufficiently specific to constitute waiver) with Tide Water Associated Oil Co., 85 NLRB No. 189, 24 LRRM 1518 (1949) (management's rights clause not sufficiently clear to constitute waiver).

[11] See, Finding No. 6.

Therefore, in the Examiner's view, it would not be a reasonable interpretation of the Reopener Clause to conclude that it entailed reopening of summer teacher wages. It may be noted that even Complainant, in its communications with Respondent demanding bargaining concerning summer teachers, differentiated between the subjects governed by the Reopener Clause and the wages, hours and conditions of employment of summer teachers. 12/

The Examiner therefore concludes that Complainant effectively waived its right and Respondent's duty to bargain with respect to summer teachers' wages, hours and conditions of employment for 1973.

Public Policy

The Examiner finds no merit in Respondent's argument that public policy requires Complainant to have utilized its interest arbitration opportunity to the exclusion of its pursuit of relief through the instant prohibited practice proceeding. Whether Complainant should agree to submit the 1973 summer teacher wages or any other subjects of contract bargaining to a final third party determination is clearly a permissive subject of bargaining within Complainant's exclusive discretion. The express legislative policy underlying MERA emphasizes voluntary agreement between the parties, making prohibited practice proceedings available when the processes promotive of voluntary agreement are allegedly interfered with. 13/ To deny a remedy for an alleged interference with the collective bargaining process solely because the complaining party exercised its discretion not to agree on a permissive subject (interest arbitration of a particular contract bargaining issue) would seem inconsistent with the aforesaid legislative purpose of MERA and therefore undesirable.

Dated at Milwaukee, Wisconsin, this 31st day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

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