STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN FEDERATION OF TEACHERS AFT, AFL-CIO, Complainant, vs. THE STATE OF WISCONSIN, Respondent.	Case L No. 18305 PP(S)-23 Decision No. 13017-C

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., for the Complainant Union.
Mr. Gene A. Vernon and Mr. Lionel L. Crowley, Attorneys at Law, Department of Administration, for the Respondent State.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Wisconsin Federation of Teachers, AFT, AFL-CIO, herein referred to as Complainant Union, having filed a complaint on September 11, 1974 alleging that the State of Wisconsin, herein referred to as Respondent State, had committed unfair labor practices within the meaning of Section 111.84, State Employment Labor Relations Act; and the Commission having by Order dated September 16, 1974 appointed Stanley H. Michelstetter II, a member of its staff, as an Examiner, pursuant to Section 111.07(5), Wisconsin Statutes; and hearing having been held before the Examiner on December 20, 1974; and the Examiner having considered the evidence, 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 the Wisconsin Federation of Teachers, AFT, AFL-CIO is a labor organization within the meaning of Section 111.81(9) of the State Employment Labor Relations Act and that it has its principal offices located at 2266 North Prospect Avenue, Milwaukee, Wisconsin.

2. That State of Wisconsin, Department of Administration is an employer within the meaning of Section 111.81(16) of the State Employment Labor Relations Act and that the Department of Health and Social Services is an agency of the State of Wisconsin.

3. That on January 25, 1974, Complainant Union was certified as the representative of certain professional educational employes of the Respondent State.

4. That at all relevant times, Respondent State had the following policy with respect to summer school courses for teachers in the instant unit which was not precisely adhered to by Respondent State's officials:

"Summer School Courses for Teachers

Employing officers with the approval of the director, are authorized to permit teachers and school principals to attend summer school without loss of pay to take courses essential to the improvement of the educational program of the institution. Every effort should be made to encourage teachers to further their teaching competence and academic attaintment [sic] with refresher courses at a recognized school in order to insure compliance with standards established by the State Department of Public Instruction and the State Board of Vocational and Adult Education and to insure full training not only in subjects to be taught, and appropriate grade levels but also in the educational problems characteristic of the institutionalized student. Employing officers shall work out with each teacher a long range plan of further academic or vocational development designed to raise the standards and effectiveness of the school.

Since institutional summer programs vary, no unifrom statewide ratio of teachers to be permitted to attend summer school can be established; instead, quotas for yearly attendance at summer sessions shall be established by each institution using the following criteria:

1. Adequate staffing shall be maintained to provide necessary services.

2. Teachers shall not normally be permitted to attend without loss of pay more frequently than every other year.

3. Employment of teachers to substitute for those attending summer sessions is not possible unless funds for this purpose are specifically budgeted or authorization for a substitution of budgeted funds is secured in addition.

4. Teachers shall be actively encouraged to attend a summer session or its equivalent at least once every four years.

5. A plan of rotation shall be established to provide equal opportunity and fair treatment for all. Whenever a teacher eligible to attend summer school is unable to do so, substitution may be made with teachers required to attend school in order to maintain active eligibility to teach given preference.

6. Teachers attending summer school as a part of this program shall carry what is considered to be a full academic schedule at the school attended.

In order to establish eligibility under these conditions, a teacher must have taught in the institution at least one school semester, must have a good record of performance and progress, and must agree to the following:

1. To work for no less than one year following the completion of summer school attendance or refund salary for that period of school attendance not charged to vacation earned or compensatory time due.

2. To assume additional duty in the school program beyond the normal work week during the course of the following school year.

Additional duty is defined as a project or service approved by the employing office and designed to improve the school program. Such

duty shall consist of one eight hour day for each week of summer school attendance. Earned vacation may be substituted for additional duty on a day for day basis.

Employes teaching in the school program other than those classified as teachers and who have been employed in teacher positions through inability to recruit fully trained staff, may be permitted to attend summer school in accordance with the above conditions providing:

1. Professional teaching standards are required of them.
2. They are eligible for admission to an appropriate summer school.
3. Such additional education will actually enhance their ability to maintain required standards of performance.
4. Such training will lead to certification as a teacher.

Requests for approval of summer school attendance shall be submitted in triplicate through the Division Administrator to the Central Personnel Office on DBM-Pers-26, no later than May 1 of each year. Each such request shall be accompanied with a statement showing last degree attained, courses taken beyond the degree, pertinence of course work to be taken to the teacher's required duties and long-range educational plans.

College, Vocational and Other School Courses

Employes shall be encouraged to enroll in such courses of instruction as will enhance their knowledge and skill in their filed or [sic] work. They may be reimbursed following successful completion of course work for all or part of the costs of such courses or time off for attendance only when attendance is a part of a formal program approved by the Administrator as being necessary to meet minimum qualifications, or standards of performance. Because of the many variable conditions surrounding the need for training, no standard pattern of reimbursement can be established. Each program will be judged on its merits, taking into consideration such factors as:

1. Ability to recruit fully trained workers.
2. Benefits to be derived by the Department.
3. Whether employes are required to enroll as a condition of employment.
4. Whether the courses involve academic credit which will benefit the employes as individuals.
5. Time loss and other costs to the Department.
6. Costs and availability of funds.

Reimbursement will be approved only when all employes needing and being able to benefit through such training are assured of equal opportunity to participate.

Requests for approval of attendance on state time or for reimbursement of any costs of instruction in this category shall be described fully on DBM-Pers-17 normally in advance of such attendance, and submitted in quadruplicate through the Division Administrator to the Central Personnel Office.

Where reimbursement of any fees is approved, payment shall be made following official notice of satisfactory completion of course work and transmittal to the Central Personnel Office of a receipt for payment of such fees."

5. That at all relevant times at least one institution, the Wisconsin Correctional Institution at Fox Lake, Wisconsin had implemented the policy quoted in Finding of Fact 4, above, in the following way as described by its manual for teachers:

"C. Summer School

1. Summer school seniority

Your name will be listed in a seniority rating of attending summer school. Your eligibility rating includes the following three things:

a. the last summer school attended while at WCI

b. the day you commenced teaching at WCI on a permanent basis

c. the day of your seniority ranking for declining summer school when eligible

Regardless of the number of teachers who do not go to summer school, only one alternate will be considered. There will be no exchanging of places on the schedule; i.e., a teacher eligible this year cannot exchange with a person who is on next year's list or within the year in which the teacher is scheduled to attend.

The roster for appointment to summer school is determined by a rotation, seniority list which is governed by date of employment at WCI. Theoretically all faculty members will get a chance to attend summer school, without loss of pay, once every three years. One day of work or vacation must be repaid the state for each week of summer school attended."

6. In a telephone conversation prior to February 28, 1974, Respondent State's representative, John Kitzke, and Complainant Union's chief negotiator, John Stevens, agreed that the parties exchange complete proposals for a comprehensive collective bargaining agreement prior to any face-to-face negotiation sessions in order that the parties could reach agreement and submit any tentative agreement to Respondent State's legislature for ratification prior to its scheduled adjournment at the end of March, 1974.

7. That thereafter but prior to February 28, 1974, Complainant Union submitted the following proposals (as amended) to Respondent State for a collective bargaining agreement for the period commencing July 1, 1974:

"ARTICLE X

Working Conditions

. . .

Section C - Summer School

Employees shall be granted leave for attending summer school without loss of pay every third year, provided that not more than 1/3 of the staff is on said leave at one time. In the event that less than 1/3 of the staff requests such leave, an employee may attend summer school more frequently.

. . .

ARTICLE XII

Rules Governing This Agreement

. . .

Section B

With regard to matters not covered by this Agreement which are proper subjects of collective bargaining, in that they relate to matters of hours, wages, or conditions of employment, and within its duration period, the Employer agrees that it will make no changes in existing policies without appropriate consultations and negotiations with the Federation.

. . ."

"Article X - Working Conditions

. . .

Section C - Summer School

add 2. Employees who work on a ten (10) month contract shall be paid to attend summer school once every three years.

add 3. Upon request, employees shall be released during the work day without loss of pay to attend graduate classes related to their area of expertise.

. . ."

8. That Complainant Union never submitted or otherwise made proposals for the period prior to July 1, 1974 other than proposals concerning the conduct of the instant negotiations themselves.

9. That thereafter, but prior to February 28, 1974, Respondent State submitted counter-proposals to those described in Finding of Fact 7 above which did not include any provision with respect to paid leave to attend summer school or the maintenance of unnamed benefits, but which included a provision substantially the same as that found in Article XII, Section 1 of the collective bargaining agreement described in Finding of Fact 22.

10. That the parties commenced face-to-face negotiations on February 28, 1974 and met again on March 6, 1974 during which time Complainant Union's proposal described in Finding of Fact 7 above was only casually discussed.

11. That in response to the casual discussion mentioned above, Respondent State's chief negotiator, Lionel Crowley, held a meeting on the evening of March 6, 1974 with officials of the Department of Health and Social Services to discuss that proposal.

12. That during the course of that meeting, Crowley learned about the summer school leave policy described in Finding of Fact 4 and the actual practice with respect thereto; that Crowley formed the intention of restricting that policy and practice in order to avoid the possibility of having other representatives seek the same or similar benefits for State employes in other units.

13. That the parties met in face-to-face negotiations again on March 7, 1974 wherein Complainant Union's representatives stated that Article X, Section C of their initial proposals without amendment constituted the present practice as Complainant Union understood it to be.

14. That thereafter during the March 7, 1974 negotiation session, the parties engaged in a lengthy discussion about the exact nature of the past practice concerning the summer school leave policy. That

Stevens testified that the parties reached agreement that Complainant Union's proposal contained in Finding of Fact 7 above was generally Respondent State's practice.

15. That thereafter during the March 7, 1974 negotiation session, Lionel L. Crowley, Respondent State's chief negotiator, stated that he could not accept Complainant Union's summer school leave proposal and stated that he could not guarantee that the rotation practice would be continued; that the rotation practice was Respondent State's practice of permitting certain unit employes to attend summer school approximately every three years at their own option with pay under certain conditions.

16. That thereafter during the March 7, 1974 negotiation session, Crowley stated that Respondent State intended to change or enforce the policy described in Finding of Fact 4 above for the summer of 1974 and subsequent periods in the following way:

1. That Respondent State would allow and direct its employes to take certain courses at full pay.

2. That Respondent State wanted to be able to direct that employes take courses needed to meet teaching certification requirements;

3. That Respondent State did not want its employes to be able to take courses that were unrelated to their job requirements;

4. That Respondent State wanted to be able to direct that employes attend summer school to take behavioral science courses without loss in pay but without reimbursement for tuition and fees; and

5. That Respondent State would no longer require that its employes continue in its employ for a set duration after summer school attendance and that it would no longer require extra work without compensation or its equivalent.

That by the foregoing statement Crowley was expressing certain results to be achieved and not the specific language that Respondent State would use to achieve those results. That at least Stevens, and possibly other members of Complainant Union's negotiating team,were aware of the foregoing.

17. That thereafter during the March 7, 1974 negotiation session, Complainant Union's representatives caucused out of the presence of Respondent State's representatives during which some of those representatives voiced the position that the present practice of paid leave to attend summer school should be preserved and that Stevens convinced them that the specific results sought by Respondent State as described in Finding of Fact 16 should be acceptable in the context of language in the agreement embodyng the changed practice or policy.

18. That thereafter, during the March 7, 1974 negotiation session, the parties resumed face-to-face negotiations and Complainant Union's representatives stated that the changes described in Finding of Fact 16 would be acceptable if incorporated into the collective bargaining agreement.

19. That Respondent State's representatives stated that they would not put the changes described in Findings of Fact 16 in the collective bargaining agreement because the parties had to have some good faith relationships, that the parties did not have enough

bargaining time to draft language to cover most of these details, that once the collective bargaining agreement contained language concerning a benefit, it was difficult to make changes in the benefit and that during the negotiations for a successor agreement the parties could be more thorough.

20. That thereafter during the March 7, 1974 negotiation session, Crowley stated that: 'That is our policy and we're not going to change that."; that Stevens understood Crowley to mean: "that with the exception of those things that were specified to us, there weren't going to be any drastic changes in the summer school policy before the summer of 1974. . ."; that Stevens at all relevant times knew that Respondent State was seeking unilateral control over the summer school policy for the period of at least March 7, 1974 to June 30, 1975; that Stevens at all relevant times knew that Respondent State was seeking the right to unilaterally determine thereafter the actual changes to be made in the language of the summer school policy referred to in Finding of Fact 4 above; that Stevens, on behalf of Complainant Union, knowingly and intentionally waived its right to notice and an opportunity to bargain with respect to language changes to be made in that policy with respect to rotation and their implemention.

21. That any inference which Complainant Union's representatives might have drawn from Crowley's statements, cited in Finding of Fact 20 above, that the goals referred to in Finding of Fact 16 were specific changes in the language of the summer school policy; that the changes that Respondent State would make therein would be entirely acceptable to Complainant Union or that Respondent State would make no further changes therein during the term of the instant agreement were all unreasonable and unwarranted. That if any such inferences were drawn, they were not in fact relied upon by the Complainant Union.

22. That thereafter and by March 8, Complainant Union withdrew its proposals referred to in Finding of Fact 7 above and that the parties reached agreement on a collective bargaining agreement for the period July 1, 1974 to June 30, 1975 which contained no part, or variant, of the proposals referred to in Finding of Fact 7 above and which contained the following provision:

"ARTICLE XII

General

Section 1 Obligation to Bargain

This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal. The parties agree that the provisions of this Agreement snall supersede any provisions of the rules of the Director and the Personnel Board relating to any of the subjects of collective bargaining contained herein when the provisions of such rules differ with this Agreement. The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Federation for the life of this Agreement, and any extension, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, [sic] even though such subject or matter may not have been within

the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

. . ."

That on or about June 11, 1974, Complainant Union ratified that agreement and that the parties executed it on July 1, 1974.

23. That on or about June 4, 1974, Respondent State, without notice to or consultation with Complainant Union, made the following changes in the policy referred to in Finding of Fact 4 above and gave effect thereto:

"The purpose of this memo is to confirm our recent meeting in which we discussed the changes in reviewing and evaluating summer school requests from teachers.

As you know, we have not had an opportunity to revise our Personnel Administrative Orders on this subject. The key changes were discussed during our meeting, however, and are summarized below. The quotations are from Chapter XIV, pages 14 and 15 of our Personnel Administrative Orders.

1) 'Adequate staffing shall be maintained to provide necessary services.'

   We want to re-emphasize that this continues. Management should only assign teachers to attend summer school if still able to provide adequate school programming to the students.

2) 'Teachers shall not normally be permitted to attend without loss of pay more frequently than every other year.'

   This has been deleted. Teachers should only be assigned by management to attend summer school without loss of pay when the teacher must go to school to obtain required certification by the Department of Public Instruction or when the person is assigned by management to attend and take courses in specified areas in order that the individual can be better prepared and a direct benefit is anticipated by management in terms of the individual meeting new requirements or making improvement in the program and teaching area for which the teacher is assigned.

3) 'Employment of teachers to substitute for those attending summer sessions is not possible unless funds for this purpose are specifically budgeted or authorization for a substitution of budgeted funds is secured in addition.'

   There is no change in this item.

4) 'Teachers shall be actively encouraged to attend a summer session or its equivalent at least once every four years.'

   This is deleted. Again, management assigns the teacher to attend because the teacher must meet certification requirements or the teacher needs additional training in a specified area to meet assigned program and job responsibilities.

5) 'A plan of rotation shall be established to provide equal opportunity and fair treatment for all. Whenever a teacher eligible to attend summer school is unable to do so, substitution may be made with teachers required to attend school in order to maintain active eligibility to teach given preference.'

This has been deleted. Our concern is that management can justify who they have assigned to attend on the basis of either certification requirements of highest program need. The basis of who is assigned and those that were not assigned must be clearly documented so that in the event of a grievance, it is clear as to how the decisions were made.

6) 'Teachers attending summer school as a part of this program shall carry what is considered to be a full academic schedule at the school attended.

'In order to establish eligibility under these conditions, a teacher must have taught in the institution at least one school semester, must have a good record of performance and progress, and must agree to the following:

a) To work for no less than one year following the completion of summer school attendance or refund salary for that period of school attendance not charged to vacation earned or compensatory time due.

b) To assume additional duty in the school program beyond the normal work week during the course of the following school year.

'Additional duty is defined as a project or service approved by the employing office and designed to improve the school program. Such duty shall consist of one eight-hour day for each week of summer school attendance. Earned vacation may be substituted for additional duty on a day-for-day basis.'

This has been changed. 'A' and 'B' above are no longer requirements because management is assigning the person to meet program needs, and the training is required. Therefore, the obligation to work for one year or make-up time is no longer appropriate.

The rest of the directive on page 15 is not changed as it relates to other staff not covered by the Education Bargaining Unit Contract. In addition, supervisory teachers and principals continue to be covered by the old policy as currently in the Personnel Administrative Orders.

Please again review each of the attached requests in light of the above changes and resubmit only those that you feel continue to be justified under these new guidelines. Please specifically state in the 'Program Objective' Section of Form DBM-PERS-26 why the person is being assigned to take the specific courses in terms of the teacher's program responsibilities. If employing units received other requests and turned them down due to the rotation system in the old policy, the requests should again be considered with the attached requests according to these new guidelines.

It is no longer appropriate to send teachers to summer school so that they can get an advanced degree or certification in a new area unless directly needed for your program. You may consider requests for leaves without pay to attend school which is primarily for the individual teacher's own interests and advancement. However, the leaves should be approved per the contract and in accordance with item #1, 'Adequate staffing shall be maintained to provide necessary services.'

Please contact me if you have any questions."

That by the foregoing changes, Respondent State eliminated the practice of rotation described in Finding of Fact 15 above for the summer of 1974 and thereafter.

24. That during the second week of June 1974, Lawrence E. Allwardt, President of State Employees Local 3271 of Complainant Union who had been present during the negotiation session of March 7, 1974, learned of the change described in Finding of Fact 23 above while in the presence of a representative of the Department of Health and Social Services. That Allwardt immediately protested the change asserting that there was an oral agreement concerning "the 'G' section of it." That thereafter, the representative replied that there was no oral agreement that those changes should not be made in the policy and that Complainant Union could "grieve it" if it wanted to.

25. That thereafter Allwardt requested of Department of Health and Social Services representatives that they bargain with respect to the summer school policy for the instant period. That those representatives met with Stevens and Allwardt and told them that Complainant Union could negotiate the matter for the next succeeding collective bargaining agreement only.

26. That the instant complaint was filed September 11, 1974 and that thereafter in October or November, 1974 Allwardt met with Crowley and asked to repoen the existing collective bargaining agreement with respect to this issue.

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

CONCLUSIONS OF LAW

1. That Wisconsin Federation of Teachers, AFT, AFL-CIO, by having made no proposals with respect to summer school leave for the period prior to July 1, 1974, by having withdrawn its proposals with respect thereto for the period commencing July 1, 1974 in response to the State of Wisconsin's assertion of unilateral control over that subject and announced intentions of exercising that control to restrict the practice known as rotation, and by having withdrawn its proposals concerning maintenance of unspecified benefits while accepting the provision appearing in Article XII, Section 1 of the parties' July 1, 1974 agreement waived its right to notice, and an opportunity to bargain with respect to the changes made therein for the period of at least March 7, 1974 to June 30, 1975.

2. That by having thereafter made unilateral changes in the summer school leave policy with respect to the rotation practice, the State of Wisconsin did not and is not violating Section 111.84(1)(a),(c), (d) or (e) of the State Employment Labor Relations Act.

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

ORDER

That the complaint filed herein be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin this 23rd day of July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

THE STATE OF WISCONSIN, L, Decision No. 13017-C

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On approximately January 25, 1974, Complainant Union was certified as the representative of certain professional educational employes of Respondent State. After the parties concluded their negotiations for their first collective bargaining agreement on March 8, 1974, Respondent State admittedly, and without any notice to Complainant Union other than that arguably given during negotiations, unilaterally changed its policy with respect to paid leave to attend summer school by eliminating the practice by which unit employes could elect to attend summer school with pay approximately every three years (rotation).

POSITIONS OF THE PARTIES:

Complainant Union took the position that during the March 7, 1974 negotiation session Respondent State stated that it intended to make certain specific changes in its summer school leave policy or benefit. It contends that thereafter, Respondent State made a more sweeping change by eliminating the rotation practice without notice to, or an opportunity for, Complainant Union to negotiate with respect thereto in violation of Section 111.84(1)(d). 1/ It contends that in acceding to Respondent State's position at the aforementioned negotiation session, it reasonably relied on Respondent State's assurances that those changes stated would be the only changes because: the parties were under admitted time pressure, the summer school leave practice was not susceptible to easily drafted language, the suggested changes involved the period prior to the beginning date of the written agreement, and Respondent State asked it to rely on those assurances. It takes the position that Respondent State discriminated against unit employes on the basis of their support for Complainant Union by making the instant changes in violation of Section 111.84(1)(a) and (c). In the alternative, it contends that the instant changes had the effect of interfering with the rights of Complainant Union's members in violation of Section 111.84(1)(a). There exists evidence, if believed, that the parties reached agreement on specific changes. Thus, in view of Complainant Union's motion to amend its complaint to conform to the evidence, there exists an allegation of a violation of Section 111.84 (1)(e) for the violation of the separate collective bargaining agreement.

Respondent State took the position that it specifically proposed the instant changes to Complainant Union. It contends that no agreement was reached to maintain the past practice or policy. In the alternative it contended that any such agreement would be void because it would be oral, does not meet statutory requirements for agreements and is superseded by the "zipper clause" of the parties' written, contemporaneous collective bargaining agreement. It further contends that Complainant Union had adequate notice of the instant changes and an opportunity to bargain with respect thereto and that Complainant Union waived its right to bargain concerning the instant changes by withdrawing its proposals with respect to summer school leave and accepting Respondent State's proposed "zipper clause". It further contends that in view of the instant waiver and notice it cannot be held to have bargained in bad faith or otherwise violated Section 111.84(1)(a), (c) or (d).

1/ All citations unless otherwise noted are to Wisconsin Revised Statutes (1973).

DISCUSSION:

The determinative issues are whether Complainant Union waived its right to notice of a contemplated unilateral change in the instant policy and an opportunity to bargain with respect thereto, and whether that waiver is limited or negated by the "assurances" given by Respondent State during the March 7, 1974 negotiation session. Section 111.84(1)(d) makes it an unfair labor practice for Respondent State to:

> ". . . refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit."

Section 111.81(2) further defines "collective bargaining" as:

> "'Collective bargaining' means the performances of the mutual obligation of the state as an employer, by its officers and agents, and the representatives, of its employes, to meet and confer at reasonable times in good faith, with respect to the subjects of bargaining provided in s. 111.91(1) with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document."

Respondent State attempted to show that Complainant Union waived its right to notice of contemplated unilateral changes in the summer school leave policy by evidence of the March 7, 1974 negotiations and the resulting collective bargaining agreement. 2/

Accreditation of Basic Facts
Concerning Collective Bargaining History

Stevens' and Crowley's testimony appears to conflict with respect to the matters that were first discussed during the March 7, 1974 negotiation session. Stevens testified that negotiations began with a back and forth discussion of the past practice with respect to paid leave to attend summer school. He stated that the original proposal without the amendment 3/ was intended to be a statement of the past practice as the Complainant Union understood it while the amendment sought certain improvements. He also testified that Respondent State agreed that the Complainant Union's initial proposal was generally Respondent State's past practice. Crowley testified that the discussion began with his statement of reasons why the proposal was unacceptable.

2/ With respect to the determinative issues, neither party has asserted that there is any difference between the duty imposed by Section 111.84(1)(d) on Respondent State and that imposed by similar statutes on other employers (namely Section 111.06(1)(d), Section 111.70(3)(a)4 or the federal Labor Management Relations Act, as amended, Section 8(a)5. Current case law requires that a claimed waiver must be established by a clear and satisfactory preponderance of the evidence of relevant contract language and/or evidence of bargaining history. City of Brookfield (11489-A) 10/73 and (11489-B) 4/75 at p. 16; Joint School District No. 5, City of Fennimore, et al. (11865-A) 6/74 and (11865-B) 7/74.

3/ Complainant Union's original proposals and amendments thereto appear in Finding of Fact 7.

It is undisputed that Respondent State rejected the proposal. Complainant Union presented the only evidence of the actual practice with repsect to summer school leave, an employe manual from the Fox Lake Correctional Institution. 4/ A comparison of that manual to the original proposal demonstrates that the original unamended proposal at least omitted some aspects of the practice favorable to Respondent State. Therefore, assuming Complainant Union communicated its intent, the Examiner concludes that one of Respondent State's reasons for rejection of the proposal was that it did not conform to the complete past practice. Therefore, the testimony of Stevens must be credited with respect to the first matter for discussion but discredited in part as to the alleged agreement that the Complainant Union's proposal was the past practice. The Examiner assumes for the purposes of argument that the parties reached some agreement as to the nature of the past practice.

Stevens and Allwardt both admitted later in their testimony what occurred after the past practice discussion. Crowley stated that in any case he could not accept the proposal for certain reasons and stated that he could not guarantee that the rotation practice would be followed in the future in that Respondent State intended to change the comprehensive policy concerning summer school paid leave. Although Crowley at first testified that he told Complainant Union's representatives that the rotation practice would be scrapped, further direct examination and cross-examination revealed that he was unsure of the exact statements and that he "meant" this when he said that he could not guarantee that the rotation practice would be followed in the future.

The testimony from both sides is ambiguous as to whether Crowley next listed specific changes or general results (concerns) which he wished to achieve in making changes. The testimony is also ambiguous as to whether those "changes" were to be made in the policy located in Finding of Fact 4 or whether the "changes" were to be made in the past practice. Stevens' notes and testimony indicate that Crowley listed certain results that he wished to have. Stevens alternately referred to the listed items as "concerns" and specific changes. The Examiner concludes that Stevens was fully aware that these were results or goals and that Respondent State intended to effect these results by changes in the language of the policy contained in Finding of Fact 4 which language was to be drafted at a later time.

Thereafter the parties caucused separately. When they reconvened, Complainant Union requested that the "changes" be incorporated in the collective bargaining agreement. Although Crowley apparently omitted this from his narrative, he confirmed it later in his testimony. Stevens testified that thereafter Crowley declined to put the "changes" in the agreement. The parties sharply disagreed with respect to the reasons Crowley gave therefor, and for the purpose of discussion, the Examiner assumes Stevens' statement of the reasons given to be correct. 5/

Finally, the parties disagreed as to the existence and wording of the "assurances" that were thereafter given. Stevens testified that to the best of his recollection it was a statement that with the exception of these things that were specified to us, there weren't going to be any drastic changes in the summer school policy before the summer

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4/ That manual provision appears in Finding of Fact 5.

5/ At p. 83 of the transcript, Crowley stated his reasons for not putting the "changes" into the agreement. If credited as the reasons stated to Complainant Union, these reasons would have constituted clear notice of their intent to eliminate the rotation practice. Sevens' statement of these reasons appears infra p. 11.

of 1974. Allwardt testified that Respondent State agreed that there would be no changes in the past practice other than those that had previously been stated by Crowley. Stevens testified that Crowley specifically asked that Complainant Union trust Respondent State. Crowley denied making any representation that the above-mentioned "changes" would be the sole changes and that he asked the Complainant Union to trust it. Upon further examination and cross-examination he stated that: "we said that it is our policy and we're not going to change that". He testified that by that statement he intended to indicate that he would not change his bargaining position that Complainant Union grant Respondent State unilateral control over the instant subject. However, upon cross-examination his testimony indicated that he also intended that Complainant Union could rely on the fact that the policy would not be changed in the near future. He testified at p. 82 of the transcript of proceedings as follows:

> "I think that when we said that when we send an employe, we'll pay him, that that indicated to them that from then on we weren't going to change that policy the very next day into something different than what we told them nor did we intend that six months down the line we were going to change that, that was our position and we hadn't made any intentions in changing it at all."

Upon the basis of the foregoing, the Examiner concludes that those words were, in part, intended to be an "assurance" and that Stevens' testimony was Stevens' understanding thereof.

Waiver of Right to Notice of
Contemplated Unilateral Change and Effect Thereof

Stevens' testimony reveals that at all relevant times during the March 7, 1974 negotiation session, he was aware of Respondent State's position that it wanted unilateral control over the summer school leave policy and that it intended to exercise that control making change therein for the summer of 1974 to achieve the goals expressed during the session. 6/ In response to that position, Complainant Union withdrew its specific summer school leave proposals for the period after July 1, 1974. (There were no proposals for the period prior to July 1, 1974.) Thereafter, it withdrew its "maintenance of benefits" proposal and accepted Respondent State's "zipper clause" appearing in Article XII, Section 1 of the parties' agreement. In cross-examination at p. 38 of the transcript, Stevens explained his reason for the foregoing:

> "Q And you, with your expertise, then dropped the proposal for any consideration as far as it being included within the contract?
>
> A We had not reached agreement on the comprehensive summer school policy, the language thereof and so forth; it was not reduced to writing that could be included in an agreement; and for that reason - along with expertise I have a certain amount of faith in people; and because the state had made a statement to us that we felt - and discussed it at length - was made in good faith, we wouldn't pursue the matter any further on this part."

That Stevens made the change in position on the basis of a "certain amount of faith in people" indicates in this context that Stevens believed that Complainant Union would not have any legal recourse

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6/ Note, for example, Stevens' understanding of Crowley's assurance.

should Respondent State not live up to Stevens' expectation. Thus, the Examiner concludes that Complainant Union waived its legal right to notice of contemplated unilateral changes in the summer school leave policy and an opportunity to bargain with respect thereto for the period March 7, 1974 to the end of the agreement. 7/

Assuming without deciding that Complainant Union could avoid its waiver 8/ or have it narrowly construed 9/ on the basis of Respondent State's "assurances" and the context of the March 7, 1974 negotiations, the actual evidence thereof does not warrant that conclusion.

Crowley's purpose, at least in part, in making the statement taken by Complainant Union's representatives as an "assurance" was to signal his final, firm position on the issue. Complainant Union thereafter withdrew its specific proposals for summer school leave language and, apparently, the next day, withdrew its general "maintenance of benefits" language and accepted Respondent State's proposal for a "zipper clause". The relevant part of that provision reads:

> "This Agreement represents the entire Agreement of the parties and shall supersede all previous agreements, written or verbal.
>
> . . .
>
> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement." (Emphasis supplied).

On the basis thereof, it is clear that the parties never intended that the "assurance" survive the July 1, 1974 effective date of the agreement. 10/ In view of the necessary relationship between the summer school leave policy applicable at the beginning of the summer of 1974 and at the end, and in view of Complainant Union's not having made original proposals for the period prior to July 1, 1974, it appears that Complainant Union did not rely on the assurances but acceded to Respondent State's assertion of economic power for the entire period from March 7, 1974.

7/ Where the employer affirmatively negotiates for unilateral control and the union accedes thereto, the union waives its right to notice of unilateral change: Shell Oil Company, 149 NLRB No. 22, 57 LRRM 1271 (1964); compare New York Mirror 151 NLRB No. 110, 58 LRRM 1465 (1965); Unit Drop Forge Div., 171 NLRB No. 73, 68 LRRM 1129 (1968); Proctor Mfg. Corp. 131 NLRB No. 142, 48 LRRM 1222 (1961).

8/ Southern Materials Co., Inc., 181 NLRB No. 153, 74 LRRM 1046, reversed NLRB v. Southern Materials Co. 447 F. 2d. 15, 77 LRRM 2814 (1971) on remand 198 NLRB No. 43, 80 LRRM 1606, at pp. 1606-7 (1972).

9/ B. F. Goodrich Co. 195 NLRB No. 152, 79 LRRM 1563 (1972); Cf. C & D Coal Co. 93 NLRB No. 137, 27 LRRM 1472 (1951); Shell Oil Co., 149 NLRB No. 22, 57 LRRM 1271 (1964); dist. Florida-Texas Freight, Inc. 203 NLRB No. 74, 83 LRRM 1093 (1973) where the union had not acquiesced to unilateral control.

10/ Bancroft-Whitney Co. 214 NLRB No. 12, 87 LRRM 1266, note 3 at p. 1267 (1974).

Even assuming, arguendo, that Complainant Union's representatives relied to some extent on the "assurance", Stevens testified at page 26 of the transcript that Crowley gave the following reasons for not putting the "changes" in the agreement:

1. There wasn't enough time to get into most of these details in enough depth to pin it down;

2. Once you get something in an agreement, it is difficult to change it;

3. Next time through we can be much more thorough;

4. That Complainant Union and Respondent State had to have some good faith relationships and just trust each other.

Immediately thereafter, Crowley gave his "assurance": "that it is our policy and we're not going to change that". Stevens' understanding of that was ". . . there weren't going to be any drastic changes in the summer school policy before the summer of 1974." In this context reasons two and three clearly indicate that Respondent State reserved the power to make future and possibly inconsistent changes during the term of the instant agreement. Stevens' understanding of the assurance clearly reflects this. Taken in the context of negotiations including Stevens' assertion that the parties had reached agreement on what the summer school leave practice was, that Respondent State already had a written policy, and that the parties were concentrating more on the "changes" at the time the above reasons were given, reason one indicates that Respondent State, in part, considered that it would be difficult to negotiate in detail the language to incorporate its goals (the "changes") into the agreement. Thus, when Stevens used the word "drastic", he realized that when Respondent State's representatives drafted the actual amendment for the summer school policy's language, they could draft language that could have negative "side effects" on the summer school policy, and/or could make additional changes to meet other goals which had not been expressed to Complainant Union. After Crowley made his "assurance", Stevens, on behalf of Complainant Union, elected to trust Respondent State. 11/ On the basis of the foregoing and the record as a whole, the Examiner concludes that Complainant Union did not rely on Crowley's "assurance" but acceded to his assertion of Respondent State's economic power on the hope (as opposed to the actual expectation) that Respondent State would not unilaterally implement the goals it expressed at the bargaining table or other unexpressed goals in a manner that would be undesirable to Complainant Union. On this basis, the Examiner finds that Complainant Union waived its right to notice of the exact changes in the rotation section of the summer leave policy and an opportunity to bargain with respect thereto prior to their implementation. 12/

Dated at Milwaukee, Wisconsin this 23rd day of July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

11/ At all relevant times, all relevant representatives of Complainant Union were aware that Respondent State intended to limit the rotation practice and related summer school policy language to some unspecified extent.

12/ There is no evidence of an independent violation of Section 111.84 (1)(a) or (c).