STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG, BURK AND WESTPORT AND THE BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 8, Complainants, vs. MADISON EMPLOYEES LOCAL 60, AFSCME, AFL-CIO, Respondent.	Case XXXVII No. 19397 MP-491 Decision No. 13856-B
MUNICIPAL EMPLOYEES LOCAL 60, WCCME, AFSCME, AFL-CIO, Complainant, vs. MADISON BOARD OF EDUCATION, Respondent.	Case XXXVIII No. 19406 MP-493 Decision No. 13843-B

Appearances:

Mr. George E. Lewis, District Representative, and Mr. Walter J. Klopp, Staff Representative, appearing on behalf of Madison Employees, Local #60, AFSCME, AFL-CIO.

Mr. Gerald C. Kops, Deputy City Attorney, City of Madison, appearing on behalf of Jt. School District No. 8 et al.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Employees Local 60, AFSCME, AFL-CIO, having filed a complaint on July 28, 1975 with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, alleging that the Madison Board of Education committed prohibited practices within the meaning of Sections 111.70(3)(a) 4 and 5 of the Municipal Employment Relations Act (MERA); and Joint School District No. 8 et al. having filed a complaint on July 24, 1975 with the Commission alleging that Madison Employees Local 60, AFSCME, AFL-CIO committed prohibited practices within the meaning of Section 111.70(3)(b)4 of the MERA; and the Commission having appointed Byron Yaffe, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4) of the MERA; and the Examiner having on August 8, 1975 ordered that said complaints be consolidated for hearing purposes; and hearing on said complaints having been held at Madison, Wisconsin on October 2, 1975, and the parties having thereafter submitted briefs in support of their respective positions; and the

Examiner having considered the evidence, arguments and briefs of the parties and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Madison Employees Local 60, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 111.70(1)(b) of the MERA; and at all times pertinent herein is the certified exclusive bargaining representative for all regular full-time and regular part-time employes engaged in custodial, maintenance and related duties, and office, clerical and related duties, except craft, professional, confidential, supervisory and administrative employes employed by Jt. School District No. 8, City of Madison, et al. and has its offices at 4646 Frey Street, Madison, Wisconsin 53705; and that Mr. George E. Lewis is the principal representative of said Union.

2. That Joint School District No. 8, City of Madison, et al., hereinafter referred to as the District, is a municipal employer within the meaning of Section 111.70(1)(a) of the MERA; and that Mr. Maurice Sullivan, the District's Director of Employee Services, is the District's chief spokesman in labor relations matters with the Union.

3. That the District and the Union have entered into a series of collective bargaining agreements covering bargaining unit personnel, the most current of which is in effect from December 15, 1974 through December 25, 1976.

4. That in the negotiations of the current agreement, the Union requested that a complete study of job classifications and salary structure be conducted by an outside firm during the term of the contract; and that the parties ultimately agreed to incorporate the following addendum into said agreement:

> "A reclassification and compensation study will be made by a qualified independent firm with an established record of expertise in the field of job evaluations; the specifications for such study to be those agreed upon by the parties. The results of such study shall be made available to both parties. Should any job classifications be reduced in pay grade such reduction shall not cause any employee holding such reduced job classification to experience a reduction in pay during the period that that employee shall continue in that job title. Such employees shall be 'red circled'. Should any job titles be classified into higher pay grades, such up grading shall take place without the usual job posting. The results of the reclassification shall become effective at the end of the first, fifty-two (52) week period of the agreement but prior to the start of the second, fifty-two (52) week period of the Labor Agreement."

5. That subsequent to the negotiation of said agreement at the April 28, 1975 Madison School Board meeting, Mr. Sullivan was directed "to approach Local #60 Union personnel on the question of postponing the custodial-clerical classification study for one year due to the financial burdens [of the District] at this time"; 1/ that subsequent to and pursuant to the Board's direction at said meeting on May 1, 1975, Mr. Sullivan called Mr. Lewis by phone and asked how the Union would respond to either a cancellation of the classification study or a postponement of the implementation of said study until the end of the second year of the agreement; that Mr. Lewis requested Mr. Sullivan to send the proposal to

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1/ Exhibit No. 19, Board Minutes, April 28, 1975, Agenda Item VIII.

the Union in writing, that on the same date Mr. Sullivan sent the following communication to Mr. Lewis: 2/

"Dear Mr. Lewis:

This is to confirm a verbal request made to you today via telephone. I have been directed by the Board of Education to inquire as to the following and consequently I wish to know the Union's position.

1) Would the Union be accepting of a postponement of the negotiated classification study until 1976, with the results to be implemented at midnight on December 25, 1976?

2) Would the Union be accepting of a cancellation of the negotiated classification study?

I am anxious to discuss this with the Board of Education on May 19 and so I would desire a response by that time."

6. That Mr. Lewis thereafter sent Mr. Sullivan's aforementioned letter, together with the following covering memorandum to the Union's officers and bargaining committee: 3/

"I forward the enclosed for your prompt consideration. I have informed Maurice Sullivan by phone that I expected the Bargaining Committee to make a recommendation to the membership, but that a change in the contract of this significance would require membership ratification.

The Employer's proposal #1 would do nothing except delay the implementation of the reclassification study for one year. It would still be implemented automatically at the end of the second year of the contract.

As you know, I would counsel you to agree to item #2; but failing that, I would then suggest that we might agree to the study to be used as a basis for negotiations for a 1977 Labor Contract. I do not, however, know if that is a possibility to which the Employer would agree.

If you want to meet to discuss this, let me know and I'll be glad to attend if possible."

7. That at a general membership meeting held on May 10, 1975 the Union's membership voted to accept Mr. Sullivan's second proposed alternative, i.e., the cancellation of the negotiated classification study addendum.

8. That on May 13, 1975 Mr. Lewis and Gary Pond, Chairman of the Union's bargaining committee, met with Mr. Sullivan to advise him of the Union's action. At first Mr. Lewis and Mr. Pond told Mr. Sullivan that the Union would agree to cancellation of the study providing that such a study be conducted on the school secretary positions, since that was the group that was most concerned about the need for reclassification of their positions; that Mr. Sullivan indicated that a study of the secretaries' positions alone would not be acceptable to the District;

2/ Exhibit No. 6.

3/ Exhibit No. 7.

and that the Union representatives thereafter stated in that event that total cancellation of the classification study was acceptable to the Union.

9. That at its May 19, 1975 meeting the Madison Board of Education discussed and voted upon the following options which were prepared by Mr. Sullivan: 4/

> "Based on the request by the Board of Education, I have explored alternatives concerning the above classification study. The following options were explored:
>
> A. Postponement of the Negotiated Classification Study until 1976 with the results implemented on December 25, 1976.
>
> The Union's response to this alternative was 'No'.
>
> B. Cancellation of the Negotiated Classification Study.
>
> The Union's response to this option was conditional. They would accept this alternative if, however, a study was conducted only on the position of school secretary. All other positions would not be studied.
>
> C. Conducting the Negotiated Classification Study in 1975 with the cost to be budgeted for 1976 and paid for in January of 1976.
>
> The consultant proposed would be accepting of this financial arrangement.
>
> D. Conducting the Negotiated Classification Study in 1975 and paying for that study in 1975.
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> This was the original proposal made in the Board Agenda CCC-18 (Item VIII-B, detail 1).
>
> Please notify me at your convenience of the course of action chosen by the Board of Education. If I may provide any additional information I would be happy to do so."

that the Board voted to accept the aforementioned option "C"; and that on May 20, Mr. Sullivan sent the following letter to Mr. Lewis regarding the aforementioned Board action: 5/

> "On Monday, May 19, the Board of Education approved the conducting of a classification study. I will be notifying the consultant in the near future.
>
> The Board approved the recommendation of Arthur Young & Company. We will notify you when Arthur Young is ready to commence. If you have any questions, please contact me."

10. That upon learning of the Board's action on May 21, 1975, Mr. Lewis advised Mr. Sullivan by letter that the Union believed an agreement had been reached to cancel the classification study and that therefore the addendum to the collective bargaining agreement was null and void,

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4/ Exhibit No. 9, Memorandum from Mr. Sullivan to Superintendent Ritchie dated May 14, 1975.

5/ Exhibit No. 10.

and furthermore that although the District could proceed to have the classification study conducted, the Union was "no longer under any obligation to give consideration to the results of such recommendations as may be made"; 6/ and that Mr. Lewis reiterated the Union's position on several occasions thereafter.

11. That on June 24, 1975, Mr. Sullivan sent the following letter to Mr. Lewis: 7/

> "As you know, the Union was extended an invitation to assist in the Negotiated Classification Study. The consultant (Arthur Young) has been in contact with us and we will be initiating the development of the process for the study. It is my continued desire that the Union assist in the development of that study (i.e. determine which positions, persons are interviewed, determine the job factors, etc.).
>
> Please notify if I am correct that the Union wishes to continue its participation."

that on June 26, 1975 Mr. Lewis responded by letter to Mr. Sullivan's inquiry, first by reiterating the Union's position that the addendum had been negotiated out of the agreement, but that: 8/

> "7. In response to your request of June 24, '...It is my continued desire that the Union assist in the development of that study (i.e. determine which positions, persons are interviewed, determine the job factors, etc.),' it is my hope that you will always find us cooperative.
>
> 8. Any cooperation or participation on the Union's part in the 'classification study' is not to be understood or construed to mean that the Union is thereby agreeing that those provisions of the collective bargaining Agreement dealing with the 'classification study' are anything but null and void.
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> With consideration of the above statements of the Union's position and provisos, please let us know of the ways in which you desire participation."

12. That on July 21, 1975, Mr. Sullivan advised Mr. Lewis by letter that the District intended to complete and implement the study as specified in the agreement and by separate letter invited the Union to meet with the consultants who had been hired to conduct the study, Arthur Young & Co., to discuss the process to be used in the study, the time-table and other key issues such as who should be interviewed.

13. That on July 22, 1975, Mr. Lewis recommended that the Union bargaining committee meet with the consultant conducting the study and that said meeting occurred.

14. That on July 28, 1975 the Union filed the complaint which is the subject matter of this proceeding alleging that the District refused to execute the agreement to cancel the negotiated classification study addendum.

6/ Exhibit No. 11, letter dated May 21, 1975 from Mr. Lewis to Mr. Sullivan.

7/ Exhibit No. 13.

8/ Exhibit No. 14.

15. That on August 7, 1975 Mr. Lewis sent the following letter to all employes in the bargaining unit represented by the Union: 9/

> "You have recently received the information that the Employer is having each of your jobs studied by Arthur Young and Associates. This will require that you provide information that is requested concerning your job.
>
> The purpose of this letter is to urge you to cooperate in every reasonable way in providing the information requested.
>
> Your Union and your Employer are in disagreement as to what is in agreement relative to the classification study. The Union believes that the provision of the contract relating to the job study became null and void when the Employer proposed that the classification study not be done and the Union agreed after a special meeting on May 10, 1975, that it should not be done. The Employer, on the other hand, maintains that it did not make such a proposal and that the classification study provision of the contract is still in force.
>
> That disagreement has been submitted to the Wisconsin Employment Relations Commission for a resolution. It will be some time before we know what the WERC will rule.
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> Should the Union not prevail in the dispute, the study will be implemented in accordance with the provisions of the contract. In that case, it would be in our interest to have the best and most complete information possible provided to Arthur Young and Associates."

16. That the Union has taken no action other than filing the complaint which is the subject of this proceeding to hinder or interfere with the conduct and implementation of the classification study conducted by Arthur Young & Co.

17. That the Union and the District's complaints state claims based upon the parties' respective interpretations of their current collective bargaining agreement; that the Union and the District have waived their right to have the Union's claim resolved through the contractually established grievance and arbitration procedure in favor of a determination of said claim by the Commission; and that the District has no recourse through the contractually established grievance and arbitration procedure to resolve the claims against the Union filed herein which is also based upon its interpretation of the collective bargaining agreement between the parties.

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

CONCLUSIONS OF LAW

1. That in view of the parties' waiver of their right to have the Union's claim resolved through the contractually established grievance and arbitration procedure, and in view of the inapplicability of said procedure to the District's claim, the Commission has jurisdiction to determine the merits of both parties' claims pursuant to Section 111.70 (3)(a) 5 and (3)(b) 4 of the MERA.

9/ Exhibit No. 18.

2. That the record fails to demonstrate by a clear and satisfactory preponderance of the evidence that the District unequivocally offered to remove from the parties' collective bargaining agreement the classification study addendum which is the subject matter of this proceeding.

3. That in view of the lack of evidence of a clear and unequivocal offer, no agreement was reached between the District and the Union to delete the addendum in question from the agreement.

4. That the District therefore has not violated Section 111.70 (3)(a)4 and 5 by failing to execute the alleged agreement to cancel said addendum and by expressing its intention to proceed with the implementation of the study as specified in the addendum.

5. That the Union, by contesting the enforceability of the addendum by filing the instant complaint while at the same time cooperating with the conduct of the classification study undertaken by the District has not violated Section 111.70(3)(b)4 of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the complaints filed herein be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 15th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union argues that it reasonably construed Sullivan's telephonic and written proposals of May 1, 1975 to postpone or cancel the classification study as a firm offer which Sullivan had the authority to make for the Board of Education. In support of the contention, the Union cites the following language in Sullivan's letter of May 1, 1975 proffering the two alternatives:

". . . I have been directed by the Board of Education . . . ."

Furthermore, the Union argues that an agreement to cancel the addendum was consummated when the Union communicated to Sullivan that it would unequivocally accept the second alternative proposal contained in Sullivan's letter of May 1, 1975. The Union further argues that it clearly accepted the second proposed alternative even though it initially explored a third alternative with Sullivan - a more limited classification study of the school secretary positions only. When Sullivan rejected that proposal the Union asserts that he was told that the Union would then accept cancellation of the entire study. Thus, the Union argues, an agreement to cancel the classification study addendum was made and that agreement should be given effect in this proceeding.

In response to the District's complaint, the Union asserts that the complaint is without foundation since there is nothing in the record to support a conclusion that the Union will resist implementation of the study if the addendum is found to be in effect and in force by the Commission. In fact, the Union argues that the record supports a conclusion that the Union cooperated fully in the conduct of the study even though it believed the addendum had been negotiated out of the agreement. Lastly, the Union argues that it surely has the right to legally contest the enforceability of the addendum without committing a prohibited practice, as is alleged herein, and therefore asks that the complaint filed against it by the District be dismissed.

The District, on the other hand, contends that at no time during the period pertinent herein did the District make a firm offer to the Union to cancel the reclassification study addendum to the agreement. It asserts that the record supports a finding that the Board intended only that an inquiry be made regarding the Union's position on alternative solutions to the financial pressures imposed by the contractual obligations to conduct and implement a reclassification study during the term of the agreement, not that an offer be made to the Union which the Union could accept without further Board action.

In support of this position, the District points out that Sullivan's initial inquiry to the Union consisted of two alternative proposals designed to elicit Union responses defining the Union's position on each proposal. It thus argues that such an open-ended inquiry cannot reasonably be construed as an offer binding the District upon the acceptance of one of the alternative proposals by the Union.

The District further asserts that Sullivan made it clear to the Union that the proposals were meant only as an inquiry since Lewis was specifically told that Sullivan would have to report the Union's position back to the Board of Education. Thus, the District argues, the Union cannot reasonably argue that it knew that its response to the proposals

would have to be taken back to the Board and at the same time argue that the Board was bound by the Union's favorable response to the second proposal.

The District also argues that even if the Examiner finds that a firm offer was made, no agreement to delete the addendum should be found since the Union conditioned its acceptance of the cancellation of the addendum on the conduct and implementation of a proposed reclassification study of the school secretary positions. This counter-offer was clearly rejected by Sullivan; and thus no agreement should be found based upon the aforementioned exchange.

Lastly, the District argues that even if the Examiner finds that an agreement was made to cancel the reclassification addendum to the agreement, the Board has retained the authority to conduct and implement the study pursuant to Section 2.05 of the parties' collective bargaining agreement, which provides in pertinent part:

> "The operation of the Madison Public School System and all of the procedures and methods of operating the School System including the creation and abolition of positions, reclassification of positions, the scheduling of work and assignment of work to the employees shall remain solely with the Employer; provided that this does not abridge the rights of the Union pursuant to the terms of this Agreement."

Thus, the District argues, because there is nothing in the agreement prohibiting it from implementing the reclassification study, the alleged cancellation of the addendum does not affect the District's right to unilaterally implement the reclassification study.

The District also argues that it follows that the Union's resistance to implementation of the reclassification study violates the parties' collective bargaining agreement whether or not the reclassification addendum was cancelled by an oral agreement, and that the Union's resistance to the implementation of the study thus violates not only the agreement, but also Section 111.70 of the MERA.

The essential question which must be answered in this proceeding is whether Sullivan's overture to Lewis constituted an offer by the District to enter into an agreement with the Union to either postpone implementation of or cancel the previously negotiated reclassification study addendum. The core of the issue relates to the District's intention at the time it made the inquiry of Lewis. 10/

If there were clear and convincing evidence that the parties intended to immediately enter into an agreement on the basis of Sullivan's inquiry and Lewis' response, the failure to reduce such agreement to writing would not preclude a finding that an enforceable agreement existed, even if the parties contemplated that the agreement would be reduced to writing in the future. 11/

While it is true that collective bargaining agreements are substantially different from other contracts, it is equally true that such agreements, in order to be enforceable, must at least be comprised of

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10/ Hamilton Foundry Co. v. Foundry Workers, 193 F. 2d 209, 29 LRRM 2223 at 2227 (6th Cir. 1951).

11/ Ibid. See also Modern Plumbing, Heating and Supply Co., (10171-A, B) 8/71 and 9/71.

an unequivocal offer to enter into an agreement and an unambiguous acceptance of that offer. 12/

Thus, in the instant case, the first and primary issue to be resolved is whether Sullivan, on behalf of the Board, manifested an intent to enter into an agreement by making an inquiry of the Union as to its position on the two alternative proposals regarding the previously negotiated reclassification addendum. The Examiner concludes, on the basis of the entire record, that no such intent was manifested, and therefore, no unequivocal offer was made. This conclusion is based primarily upon the fact that Sullivan's communications to Lewis, both written and oral, were expressed in the form of inquiries rather than a proposal, that alternatives were presented for the Union's consideration rather than a single proposal for its acceptance or rejection, and that it was made clear to the Union that Sullivan had to return to the Board of Education with the Union's response to his inquiry. These facts, in the Examiner's opinion, support the conclusion that Sullivan fairly and clearly communicated to the Union that the Board wanted to be apprised of the Union's position on thses issues so that it could consider all available alternatives to deal with the financial constraints it faced with accurate information as to the Union's position on those alternatives. The minutes of the Board's meetings during which it authorized that the inquiry be made and during which it considered and voted upon the alternatives available to it give further support to this conclusion.

Thus, even if the Union construed Sullivan's inquiry as an offer and thereafter tendered an unambiguous acceptance of what it perceived to be a firm offer, 13/ no agreement can be found to exist since an essential ingredient to that agreement, an unequivocal offer, was lacking.

In view of the Examiner's finding that no offer was made by the District to cancel the addendum and therefore no resulting agreement occurred, it is unnecessary for the Examiner to dispose of the defense raised by the District that it has retained the right to conduct and implement the reclassification study by virtue of the management rights clause in the agreement which defines as a management right the reclassification of positions, even if it were found that the parties did agree to cancel the reclassification study addendum to their collective bargaining agreement.

Lastly, with respect to the District's allegation that the Union has violated the parties' agreement by resisting implementation of the study, the Examiner finds that to the contrary, the record is replete with evidence that the Union has cooperated fully with the conduct of the reclassification study. Futhermore, the record is void of any evidence that the Union would resist implementation of the study if it does not prevail in this complaint proceeding. Surely, the processing of the complaint filed herein by the Union on the basis of its mistaken belief that an agreement had been entered into to cancel the reclassification study addendum, without any other evidence that the Union otherwise interfered with or intended to interfere with the conduct or implementation of the reclassification study

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12/ Modern Plumbing, Heating and Supply Co., supra.

13/ Although there is conflicting testimony on the record as to whether or not an unambiguous acceptance of the second proposal to cancel the reclassification study addendum was tendered by the Union, the Examiner finds that such an acceptance occurred. In the Examiner's opinion, the Union's account of Lewis' response to Sullivan's inquiry regarding the proposal is the more accurate of the two versions of that conversation which were presented on the record. This finding is based upon Sullivan's imprecise recollection and evasive testimony pertaining to said conversation.

undertaken pursuant to the agreement contained in said addendum, cannot reasonably be construed as a violation of the parties' collective bargaining agreement.

For all of the foregoing reasons, both of the complaints filed herein are deemed non-meritorious and accordingly, the Examiner has dismissed both of the complaints in their entirety.

Dated at Madison, Wisconsin this 15th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner