STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREENFIELD EDUCATION ASSOCIATION, Complainant, vs. SCHOOL BOARD, SCHOOL DISTRICT NO. 6, CITY OF GREENFIELD, Respondent.	Case XXXV No. 19656 MP-519 Decision No. 14026-A

Appearances:
Perry and First, S.C., by Mr. Richard Perry, Esq., and Mr. Arthur Heitzer, Esq., on behalf of Greenfield Education Association.
Mulcahy and Wherry, S.C., by Mr. John Maloney, Esq., and Mr. Mark Vetter, Esq., on behalf of School Board, School District No. 6, City of Greenfield.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Greenfield Education Association having filed an amended prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that School Board, School District No. 6, City of Greenfield, has committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin, on November 25, 1975, before the Examiner; and the parties having thereafter filed briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Greenfield Education Association, herein Association, is a labor organization and at all times material herein was the exclusive bargaining representative of all regular full-time and part-time certificated teachers, but excluding all supervisors, managerial employes, non-teaching personnel, and confidential employes employed by School Board, School District No. 6, City of Greenfield.

2. That School Board, School District No. 6, City of Greenfield, herein the District, or Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of MERA; and that Respondent is engaged in the providing of public education in Greenfield, Wisconsin.

3. That the Association and the District having been privy to a series of collective bargaining agreements; that the parties in 1973 agreed to a two year contract; that Article XXVI of said contract, entitled "Term of Agreement", provided in part that:

> "This agreement shall be effective August 28, 1973 and shall remain in effect through August 14, 1975, except Article VI, Section 7.1, the salary schedule and the specific dates on the calendar for the 1974-1975 school year."

4. That that contract provided for a grievance procedure which culminated in final and binding arbitration; and that Article III, of said contract, entitled "Grievance Procedure", provided in Section 1 that:

> "Purpose - Definition. The purpose of the grievance procedure is to provide a method for quick and binding final determination of questions and interpretation and application of the provisions of this agreement."

5. That the 1973-75 contract also contained provisions relating to hours of work and class size; that Article VI therein, entitled "Hours of Work", provided:

> "1. Basic Hours: The basic hours of work for professional personnel shall be eight (8) hours per day in the high school, seven (7) hours and forty-five (45) minutes per day in the middle and elementary schools, inclusive of the duty free lunch period.
>
> 2. Other: The duty hours for each teacher are to be continuous, but the teachers' starting and stopping times will be adjusted to meet the needs of the program, except that time by a teacher for athletic coaching during the normal hours of student class attendance shall be excluded in computing the said continuous hours. When a teacher is no longer responsible for a coaching assignment, the duty hours will be continuous. All teaching assignments shall be made by the principal and Superintendent. The administration shall consult with staff member concerning his or her assignments. All teachers may be required to attend teachers' meetings up to two hours per month, in addition to the regularly assigned hours of work. Not more than one hour of teachers' meetings can be called in any one week. Any teachers' meeting called, no matter how short, will be counted at least one-half hour.
>
> 3. Extra Duties: When possible, extra duty assignments for teachers returning for the following school year should be stipulated on or before May 15, reduced in writing in the form of job description and duties, [sic] signed by the Superintendent and the individual involved by June 1st.
>
> A master list of extra duty assignments shall be submitted to the G.E.A. executive board. The Superintendent shall retain the exclusive right to make additions, deletions, or to suspend in full or in part or discontinue any or all extra curricular activities upon giving a fifteen (15) day written notice to the assigned individual teacher.
>
> 4. Open House, Other Activities: One open house per year, when scheduled, shall be considered part of a teacher's assignment. Nothing in this agreement should be construed as discouraging attendance at or participation in on a voluntary basis, activities of a professional nature or community activities.
>
> 5. Teaching Day: The teaching day for full time teachers shall be as follows:
>
> A. High School:
>
> 1. Split Shift: During the operation of the split-shift schedule, the normal assignment for a classroom teacher will be five classes and an average of 30 minutes per day supervisory duty.

2. Traditional Schedule: During operation of a traditional seven period day, the normal assignment for teachers will be five classes per day, five days per week for a total of 25 class periods. Total weekly contact per class shall be between 250 and 270 minutes. In addition to classes, teachers each week may have one hour homeroom assignment and two and one-half hours of scheduled supervision.

3. Innovative Scheduling: In the event an innovative scheduling system is adopted, teachers will be assigned to classes not to exceed 270 minutes per day on a weekly average.

4. Sixth Period Assigned: In cases where it is necessary to assign teachers a sixth (6th) class period, they will be compensated at a rate of 5% of their base annual salary or $500.00, whichever is greater, per semester of the extra assignment and shall not be assigned a supervisory duty. This does not apply to teachers who have a total student load of 100 or less students. When assigning teachers to a 6th period, volunteers shall be considered first and no teacher shall be so assigned more than once during the term of the contract. During the 1973-74 contract the high school program shall not include more than twenty-five (25) teacher semesters. A teacher semester is defined as one (1) teacher for one (1) semester assigned to six (6) class periods.

5. Discipline: When necessary to maintain discipline, the principal may make assignments of teachers to the bus loading area, corridors, lavatories, etc.

6. Other: During the balance of the teaching day, teachers will be available for consultation with students, parents, colleagues and administrators.

B. Middle School:

Teachers in the middle school operating on a seven-period day shall be assigned 28 1/2 contact hours per week, of which 25 contact hours are to be used in direct classroom teaching. (A contact hour is defined as a period of instruction and/or study hall with pupils in attendance of 52 minutes in length minimal.)

C. Elementary:

Teachers in elementary schools shall be assigned 25 teaching hours per week, including recess, recognizing that elementary teachers assume an obligation for all teaching functions to a quality educational program.

6. Reopener: This article shall be subject to re-negotiation for the 1974-75 school year."

6. That Article X of said contract, entitled "Classload", provided:

"1. Normal Teacher Load: The recommended teacher load in the various classifications for classroom teachers is as follows:

K - 3 . . . . . 26 pupils per individual teacher
4 - 6 . . . . . 28 pupils per individual teacher
7 - 12 . . . . . 31 pupils per individual teacher
High School Slow Learner20 pupils per individual teacher

2. Exception: If any class exceeds the above load by more than 10%, relief, if requested by the teacher, will be provided as follows:

(1) Re-assign students to reduce the load; or
(2) Provide a teacher aide to assist the teacher.

3. Activity Type Classes: The above conditions shall not apply to activity-type classes or classes which traditionally involve larger groups of pupils such as physical education, music, health, driver education, typewriting, home room and study hall."

7. That in the Spring of 1975 the District tendered individual teaching contracts to teachers for the 1975-76 school year; and that those contracts in part provided:

"IT IS MUTUALLY AGREED that this contract is subject to amendment to conform to the terms of any settlement reached through collective negotiations between the School District and the Greenfield Education Association.

IT IS FURTHER UNDERSTOOD AND AGREED that said teacher employed under the terms of this contract is subject to the Rules and Regulations duly adopted by the school board of said district, and in the performance of this Contract, both parties shall abide by the provisions of the Laws of Wisconsin relating to Common Schools and acts amendatory thereto."

8. That commencing in April, 1975, the parties began negotiations for a successor collective bargaining agreement; that the Association then proposed numerous contractual provisions, some of which related to hours, class size, teacher in-service programs, evaluation of staff, protection of teachers, professional training payments; that as to hours, for example, the Association proposed:

"ARTICLE VI - Hours of Work

1. No Change.

2. No Change.

3. No Change.

4. No Change.

5. A. 1. Delete

2. Rewrite as follows:

'During operation of a traditional seven (7) period day, the normal assignment for teachers will be five (5) classes per day, five (5) days per week for a total of twenty five (25) class periods.

There shall be an average of 305 contact minutes per teacher per day. In addition, the total number of contact minutes for a five (5) days [sic] week shall not exceed 1525 contact minutes. The maximum number of contact minutes shall not

exceed 320 contact minutes on any given day. Conta minutes shall be defined as the time assigned for the instruction or supervision of one (1) or more students. Nothing shall prevent the administration from scheduling less than the above amount of contact time.

In any school of this District where the schedule provides for passing time between classes, the contact time between any consecutive instructional and/or supervisory assignments shall be counted as contact time. In addition to regular classes, teachers each week may have one half (1/2) period of homeroom assignments, all within the maximum contract [sic] minutes.

Every effort is to be made to distribute assignments as equitable as possible. In no case shall a teacher have more than three different subject and/or grade level preparations per day.'

3. No Change.

4. Delete

5. Add the following sentence: 'Such duties shall be part of the one period of schedule supervision per week.'

6. No Change.

7. No Change.

B. 1. Replace with same language as 5 (A) (2) above except to provide for 1/2 period of scheduled supervision per week.

2. Delete last sentence.

3. No Change.

4. Delete

C. No Change.

6. No Change.

7. Add the following: 'No study hall shall exceed a sustained ration of 50-1.'"

9. That the Association also proposed Article X, entitled "Class Load", which read:

"Replace entire article with the following language:

'1. All classes should be of workable size commensurate with the circumstances and specific class organization and pattern.

2. A number of important instruction variables will be given careful consideration in determining the size of specific individual classes, including: needs and interests of students, approved instructional methods, size and configuration of the facility and its equipment, grouping procedures, degree of individualization, program objectives, previous student achievement, etc.

3. 'Class Size' as specified in this Article refers to the number of students per instructional class period. These same ratios will also apply in all team teaching groups that are established. Temporary combinations of students in large groups for appropriate learning activities are approved just as independent study is approved.

4. Impact of Class Size on Program: Class size is recognized as a vital element in the effectiveness of instruction. All program planning and building planning should include consideration of possible class sizes best suited to the course or facility.

5. Class Size: Principals will develop class assignments on the basis of the following guidelines:

A. District-Wide

All performing groups (band, chorus, etc.) in accordance with the objectives of the groups and the consenses of teacher and principal.

	Maximum Size
All 'corrective' sections	15
All 'remedial' sections	6
All special educational enrollments per instructor*	
TMR - Lower	7
TMR - Intermediate	10
TMR - High School	12
EMR - Primary	12
EMR - Intermediate	12
EMR - Junior High	12
ED	12
LD - Self Contained	10
LD - Resource Room	12

*Additions beyond maximum only by approval of multi-disciplinary team (Dir. of Sp. Ed., social worker, all teachers involved) or as otherwise prescribed by state statutes.

B. Elementary

	Desirable Size	Maximum Size
K-6 Academic Classes	24	27
K-6 Music, Art	24	27
K-6 Physical Education	28	30

C. Middle School

7-8 Academic Classes	24	27
7-8 Laboratory/Shop	Not to exceed the number of work stations or academic maximum, whichever is less	
7-8 General Music	24	27
7-8 Physical Education	28	30

D. High School

9-12 Academic Classes	26	29
9-12 Laboratory/Shop	Not to exceed the number of work stations or academic maximum, whichever is less	
9-12 Advanced Seminars		20
9-12 Physical Education	32	34

6. Classes above or below listed maximums

A. Within 15 days after pupils return to school in the fall all class sizes will be reported to the Superintendent. Corrective or relief procedures will proceed promptly in those classes where enrollment exceeds desirable sizes, with the exception that at any time 10% at the High School and 10% at the K-8 level of classes in the district may be in a range above desirable size and including maximum size.

B. Under extraordinary circumstances the district may maintain class sizes in excess of listed maximums where there is only a single section of that class offered in a building. The limit under such circumstances shall be extended to 31 and an instructional aide shall be provided for the student day where enrollments range from 27-31.

C. Except under circumstances that would significantly affect the health and safety of the students, no reduction in oversized classes will be made during the last nine weeks of school.

7. Reduction of classes in excess of listed maximums

In the event that a class of appropriate size increases in enrollment beyond the listed maximum between the period of initial size registration with the Superintendent and the 1st nine weeks, corrective or relief measures will proceed promptly. (Except as outlined in 6B)

8. Scheduling Exceptional Students

Handicapped children will be mainstreamed as evenly as possible among similar classes in the same building.

9. 'Stacked Classes'

Where there is evidence of definite student need and interest, but not enough to warrant scheduling a class, two small groups of a similar and compatible nature may be combined and taught concurrently with consent of instructor."

10. That by letter dated May 9, 1975, 1/ Mr. Mark Vetter, the attorney for the District, proposed certain bargaining demands; that by a separate letter that day, Vetter advised the Association that the District would not bargain over certain non-mandatory subjects of bargaining proposed by the Association, and there stated:

"The purpose of this letter is to inform you and the members of the Greenfield Education Association bargaining committee that it

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1/ Unless otherwise noted, all dates hereinafter refer to 1975.

is the position of the School Board of City of Greenfield School District #6, that the following items contained in the proposals for negotiations submitted to the Board of Education by the Greenfield Education Association are non-mandatory subjects of bargaining.

1. 'Evaluation of Staff' (P. 5 of the Association's proposals). The selection of staff evaluators referred to in the third and fourth sentences of the Association's proposal are non-mandatory subjects since they do not relate directly to the teacher's ability to perform as required by the employer. They reflect efforts to determine management techniques rather that the 'conditions of employment' of the teachers.

2. Article VI - HOURS OF WORK: (Pp. 7-8 of the Association's proposals). The Board retains the right to determine the number of contact hours and preparation periods during the normal school day and school week. These matters directly relate to the District's determination of how quality education may be maintained. However, since this decision may have a direct affect upon the teachers [sic] working conditions, the impact there will be bargained with the teachers.

3. Article IX - PROTECTION OF TEACHERS: Paragraph 1, 'Classroom Discipline' (Pp. 12-13 of the Association's proposals)

   Paragraphs A through G of this proposal deal with matters involving the basic educational policy of the District. These matters are management rights which belong to the Board of Education. However, the remainder of the Association's proposal, which deals with circumstances where there is a physical threat to the teacher's safety, is a mandatory subject of bargaining and will be bargained with the Association.

4. Article X - CLASS LOAD: (Pp. 14-16 of the Association's proposals). The District has the right to unilaterally establish the class loads at the various levels of education in the District. The size of a class is a matter of basic educational policy and therefore need not be bargained. However, the Board will bargain with the Association regarding the impact of the class loads which it establishes.

5. Article XIX - PROFESSIONAL TRAINING PAYMENTS: Add a new 4 (P. 19 of the Association's proposals). The formation of a committee to investigate and develop an in-service program and the designation of the participants on the committee is a non-mandatory subject of bargaining since the development of an in-service program has only a minor impact upon teachers' working conditions. However, the District will bargain the requirements for participation of employees within the in-service program and the credits earned for participation therein since these matters directly affect the teachers' wages, hours and working conditions'.

It is the Board's position that the proposals of the Greenfield Education Association outlined above are an attempt by the Association to negotiate upon decisions which have been reserved to the Board of Education by both Statute and case law. The Board of Education respectfully declines to negotiate on these proposals or any reference to these topics in the present agreement as they are believed to be non-mandatory subjects of collective bargaining. The Board, through its bargaining representative, will inform

the Association of its decisions in these areas during the course of the bargaining so that the Association can present any proposals it desires regarding the impact of these decisions upon the wages, hours or conditions of employment of the teachers. The Board of Education is prepared to negotiate on the other items contained in the bargaining proposals of the Greenfield Education Association."

11. That the parties subsequently engaged in collective bargaining negotiations; that the Association there discussed its proposals relating to evaluation, hours, protection of teachers, class load, and training payments; that the District refused to bargain over those proposals and, instead, was willing only to meet and confer on those subjects, and it did so; that the District also offered to bargain over the effects of decision it made in those areas; and that the Association insisted that the District had to bargain over the decision themselves.

12. That the parties in negotiations also discussed modification of the contractual provisions relating to grievances and arbitration; that the Association, for example, proposed that a permanent umpire system be established for arbitration; that the parties were unable to resolve the particular issue until on or about September 11 or 15 when the Association dropped that proposal; that the parties also agreed to some modifications of the grievance procedure, the last one being an editorial change on or about August 25; that, but for that editorial change, the parties had previously agreed to a grievance procedure; and that the parties never reached impasse over the grievance-arbitration procedure.

13. That following termination of the contract on August 14, there is no indication that the parties mutually agreed to extend the provisions of that contract.

14. That Gibson testified that the parties had reached impasse prior to the termination of the contract over its proposals relating to hours of work and class size; that on or about August 28, the District unilaterally adopted new and/or revised policies regarding hours of work, class size and staff development program; that the District unilaterally promulgated said policies on September 2, the first day of the 1975-76 school year; and that the District had earlier discussed some of those areas with the Association.

15. That a "class" grievance was filed with the District on September 10 over the implementation of those policies; that James Gibson, Executive Director, Lakewood UniServ Council East, and the Association's main spokesman in negotiations, testified that the grievance centered on the fact that the District "refused to bargain with us and that there is a committment in the contract to bargain in good faith;" and that the grievance itself provided:

"1. Name of Employe: Marilyn Wescott, on behalf of all teachers so affected.

2. Position: President, Greenfield Education Association

3. Contract Provisions Violated:

   a. Article I - Recognition
   b. Article II - Management Rights
   c. Article VI - Hours of Work
   d. Article X - Classload
   e. Article XIII - Department Chairmen
   f. Article XXVIII - Entire Memorandum of Agreement
   g. The Individual Teacher Contracts

4. Detailed Facts:

a. Article I - Recognition - The Board has refused to bargain with the GEA on the subjects of 'Hours of Work' and 'Classload'.

b. Article II - Management Rights - The Board has exercised their rights under this Article in violation of the provisions of the collective bargaining agreement.

c. Article VI - Hours of Work - The Board has exceeded several standards contained in this article including but not necessarily limited to the amount of contact time for elementary teachers, and the amount of supervisory time for numerous high school teachers.

d. Article X - Classload - The Board has exceeded the standards contained in this article in numerous instances.

e. Article XIII - Department Chairmen - The Board has not acted in accordance with Section 4 - Selection and has knowingly violated Section 5 - Compensation.

f. Article XXVIII - Entire Memorandum of Agreement - The Board has made unilateral amendments (modification of existing standards) to the agreement without the consent of the GEA. In fact, the GEA has, on numerous occasions objected to the changes the Board said they would unilaterally make.

g. The Individual Teacher Contract - Each teacher who was offered and who signed an individual teaching contract for the 1975-76 school year did so in good faith and with the belief that the minimum standards they would be working under would be those contained in the collective bargaining agreement in existence at that time. And [sic] further that any modifications to those standards would only be achieved through good faith bargaining between their bargaining representative, the GEA and their employer, the Board. The Board has violated the spirit and intent of the individual contract by making the unilateral changes in working conditions expressed elsewhere in this grievance.

It is also our belief and understanding that the Board intends to pay teachers at the 1974-75 salary levels if no agreement on a successor contract is reached by the first pay date. This action would be in violation of the express terms of each teacher's individual contract in that payment of the 1974-75 salary rates plus an increment, where earned, is the minimum possible standard until a successor agreement is reached.

5. Corrective Action Requested:

a. The Board cease and desist from all of the above stated violations.

b. The Board bargain in good faith with the GEA on the subjects of 'Hours of Work' and 'Classload'.

c. The Board compensate every teacher who was assigned work in excess of the 1974-75 standards. The rate of compensation is to be based on each teachers [sic] hourly rate as computed from the salaries agreed to in the successor agreement arrived at between the GEA and the Board.

d. Back pay plus interest on all salaries not paid teachers in accordance with 3g. above.

e. All costs resulting from the processing of this grievance including but not limited to:

1) staff and attorney's salaries, fees, and expenses
2) miscellaneous printing and copying costs
3) all arbitration costs

f. Other remedies as the arbitrator may deem appropriate.

6. Grievant's Signature Marilyn Wescott /s/ Date 9-11-75

7. Employes' Representative's Signature James H. Gibson /s/ Date 9-10-7

16. That by letter dated September 25, Edward Drent, Chairman of the District's personnel committee, advised Wescott that:

"The President of the Greenfield Board of Education, Mr. Ervin Kryszewski, has referred your letter dated September 10, 1975, to me as Chairman of the Personnel Committee for review and response.

As you are aware, the 'Agreement between School Board, School District No. 6, City of Greenfield and Greenfield Education Association', for the school years 1973-74 and 1974-75 expired on August 14, 1975. The grievance and arbitration provisions in the Agreement are therefore no longer in effect. The Board of Education therefore respectfully declines to process the grievance you submitted or to recognize the existence of the grievance at this time.

If there is some misunderstanding by various members of the Association regarding policies which are now in effect or the actions which have been taken by the Administrative staff in the areas of class load, selection of department chairmen and the payment of teacher salaries, I would recommend that you contact either Mr. Allender or Mr. Wojack to discuss these items.

Teachers who may have individual problems relative to class load, salary, etc., should first consult with their building principal. If the building principal is not able to satisfactorily resolve the problem for the teacher, central office administrators will become involved.

Should you have any other questions regarding the matters presented in your letter, please feel free to contact me."

17. That by letter dated September 30, the Association informed the District that it wished to arbitrate Wescott's grievance; that the District on October 9 stated that it would not arbitrate the issues raised in Wescott's grievance; that as of the instant hearing, the District has refused to arbitrate that matter.

18. That the parties subsequently agreed to a collective bargaining agreement on or about November 23; that said contract provided that it would be effective from "August 15, 1975, and shall remain in full force and effect through August 14, 1977 except as otherwise provided in this Agreement"; that Gibson acknowledged at the hearing that the District in negotiations never stated that the contract would be retroactive for non-monetary items; that there was no specific discussion in negotiations as to whether the grievance-arbitration procedure would be retroactive to August 15; and that Gibson further conceded that, because of the lack of such a discussion, he "had no understanding" and that "the question never came to my mind" as to whether the arbitration provision would be retroactive.

19. That the parties also agreed at about that time to an understanding relating to "Hours of Work" and "Department Chairpersons"; and that that understanding provided in essence:

"I.
HOURS OF WORK

The School Board hereby guarantees that the present policy dealing with hours of work will not be changed during the 1975-76 or 1976-77 school years, unless:

A. the Board loses the pending litigation dealing with the hours of work, then it agrees to bargain with the Association, reach agreement with the Association on a new hours of work article and put said article into the collective bargaining agreement. The Board also agrees not to delay the implementation of the Commission's decision pending possible appeals.

B. the Board wins the pending litigation or if the pending litigation is not decided prior to April 1, 1976 or when the parties commence bargaining on the reopener issues for the 1976-77 school year, the Board agrees to treat the subject of hours of work as a reopener issue.

II.
DEPARTMENT CHAIRPERSONS

During the term of this Agreement, the Board would agree to combine the following small departments and have them represented as follows:

A. Home Economics and Industrial Arts -- a new Department Chairperson at the Middle School will be appointed.

B. Physical Education and Athletic Director -- a new Department Chairperson at the Middle School will be appointed.

C. Music (Vocal and instrumental) and Art would be represented by Mr. Frank Dominguez. However, Mr. Dominguez will not be required to perform any budgetary duties.

D. Guidance Counselors would not be represented by a Department Chairperson.

The foregoing agreements constitute a part of the 1975-76, 1976-77 collective bargaining agreement between the parties and will be attached thereto."

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

CONCLUSIONS OF LAW

1. That the District's refusal to bargain over the Association's non-mandatory bargaining proposals was not violative of Sections 111.70(3)a 1 or 4, nor any other section, of MERA.

2. That the District did not violate Section 111.70(3)(a)1 or 4, nor any other section, of MERA, when, at the termination of the contract, it refused to abide by certain contractual provisions

which related to non-mandatory subjects of bargaining and where it thereafter established certain policies which related to non-mandatory subjects of bargaining.

3. That the District's actions herein did not breach any individual teacher contracts in violation of Section 111.70(3)1 and 4, nor any other section, of MERA.

4. That the District's refusal to process Wescott's grievance to arbitration was not violative of Section 111.70(3)(a)1 or 4, nor any other section of MERA.

5. That the District violated Section 111.70(3)(a)1 and 4 of MERA by unilaterally altering the previously established grievance procedure.

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

ORDER

1. IT IS ORDERED that the complaint allegations relating to the District's refusal to bargain over proposals relating to non-mandatory subjects of bargaining, the District's abrogation of certain contractual provisions pertaining to non-mandatory subjects of bargaining and its implementation of certain policies relating to said subjects at the termination of the contract, and the District's abrogating of the arbitration procedure at the termination of the contract, be, and the same hereby are, dismissed.

2. IT IS FURTHER ORDERED that the District, its officers and agents shall immediately:

(a) Cease and desist from unilaterally abrogating any previously established grievance procedure, unless the parties first reach impasse on that issue in any collective bargaining negotiations.

(b) Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 5th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT, absent impasse, unilaterally abrogate any previously established grievance procedure.

Dated this day of 1976.

By_____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant primarily contends that the District has acted unlawfully by: (1) refusing to bargain over the Association's proposals relating to non-mandatory subjects of bargaining during collective bargaining negotiations for a successor contract; (2) unilaterally implementing certain policies relating to non-mandatory subjects of bargaining; and (3) refusing to process Wescott's grievance through the grievance-arbitration procedure, as requested. The District, on the other hand, contends that it did not commit any prohibited practices and asks that the complaint be dismissed in its entirety.

Before considering the above complaint allegations, it is best at this point to present an overview of this case so that each of those issues can be kept in better perspective. In this connection, it must first be noted that some of the issues herein are ones of first impression for the Commission, as it does not appear that the Commission has ever before expressly ruled upon them. 2/ Thus, while the Commission may have ruled on some of these issues in applying the provisions of the Wisconsin Employment Peace Act, herein WEPA, as they apply to private sector employment, the issues herein all arise in the context of a public sector labor dispute. Inasmuch as there are different policy considerations underlying public and private sector labor relations, and since MERA and WEPA have some significantly different statutory provisions (the most notable of which is the absence of the right to strike in MERA), caution must be taken before one automatically adopts the rules of private sector employment and applies those rules to public sector employment. Additionally, the issues presented are significant since they involve fundamental policy considerations, considerations which directly affect the relative power that public sector parties have in collective bargaining disputes. Because of the importance of these issues, the Examiner has attempted to consider them within the full context of other collective bargaining considerations, in order that the analysis herein is complete.

With the foregoing in mind, it is now proper to consider each of the three issues presented seriatum.

1. The District's refusal to bargain over the Association's proposals relating to non-mandatory subjects of bargaining.

As noted above in paragraphs 8 and 9 of the Findings of Fact, the Association in negotiations made certain proposals, including some which related to "Hours of Work" and "Class Load." The District, however, refused to bargain over said subjects on the ground that they constituted non-mandatory subjects of bargaining under the Commission's decision in Oak Creek, 3/ and Beloit 4/.

2/ This Examiner has recently ruled that an employer did not have to bargain over certain permissive subjects of bargaining. Board of Education, Oak-Creek Franklin School District No. 1, Decision No. 14027-A (9/76). Inasmuch as that case involved a memorandum of understanding between the parties on that subject, and since no such memorandum exists herein, that case is somewhat distinguishable.

3/ Oak Creek Franklin Joint City School District, 11827-D (9/74), aff'd Dane Co. Cir. Ct., 144-473 (11/75).

4/ City of Beloit (Schools), 11831-C (9/74), aff'd Wisconsin Supreme Court, 73 Wis. 2nd 43, (6/76).

The Association does not dispute that its proposals on "Hours of Work" and "Class Load" did constitute non-mandatory subjects of bargaining under Oak Creek, supra, and Beloit, supra. Further, the Association makes no claim that the District either refused to meet and confer on said subjects, or that it refused to bargain over the effects of said decisions. Instead, the Association basically claims that the District must bargain over its proposals by virtue of the fact that the parties have bargained over them in the past. In this connection, the Association argues that the District's refusal to bargain threatens the balance of the bargaining relationship which exists between the parties; that the District has waived its right to refuse to bargain over these subjects because of past bargaining history; that such subjects, once bargained, continue "as part of the 'Common law' of the employment relationship"; and that "the existence of individual teaching contracts . . . further reinforces the Board's obligation to bargain the subjects at issue."

As to individual teacher contracts, it is true, as noted in paragraph 7 of the Findings of Fact, that those contracts do provide that they are subject to the master collective bargaining agreement. However, there is no language of any kind therein to the effect that the District will continue to bargain over permissive subjects of bargaining in the future. Moreover, said contracts also provide that teachers will be subject to the District's rules and regulations. Since questions relating to the areas in dispute are reserved to the District under Oak Creek, supra, and Beloit, supra, this latter proviso makes it clear that the teachers may be asked to work under such conditions which have been unilaterally established by the District. Additionally, while the Association contends that teachers assumed that they would continue to work under the same conditions as in the past, there is no record evidence that teachers in fact had that expectation. Furthermore, since the Commission's decisions in Oak Creek, supra, and Beloit, supra, were issued well before the tendering of the individual contracts herein, it is difficult to see how any teachers could have reasonably assumed, in the face of those decisions, that the District would be required to continue to bargain over such permissive subjects of bargaining in the future. Lastly, it is immaterial what those teachers may have expected, as the District's legal duty to bargain over the areas in issue is not dependent upon the private, subjective, unwarranted views of its employes. Accordingly, there is no merit to the Association's assertion that individual teacher contracts required the District to bargain over the proposals in issue. The complaint allegation to this effect is thereby dismissed.

Similarly unfounded is the Association's claim that the District is required to bargain because the contractual provisions in the 1973-75 contract constituted a "common law" type relationship. In support of this view, the Association claims that once those contractual provisions were bargained, they became "an integral part of the employment common law" and that as a result, the District was required to continue bargaining over such "basic conditions of work." The Association, however, has failed to present any case authority, in either public or private sector employment, which has accepted such a novel theory. Instead, it relies exclusively on John Wiley & Sons v. Livingston, 84 S. Ct. 909 (1964) for this proposition. The Association's reliance on Wiley, supra, is unfounded as that case did not center around a public employer's continuing duty to bargain over permissive subjects of bargaining. In this connection, it is true that the proposals herein do affect the employment relationship. However, that fact is not controlling as it is well established that an employer does not have to bargain over all matters which affect that relationship. Thus, while many matters may affect conditions of employment, all such matters are not subject to the bargaining process, a point which the Commission itself recognized in Oak Creek, supra, and Beloit, supra. Since the District here has offered to bargain over the effects of the decisions herein, there is no basis for finding that it must also bargain over those decisions, even though those decisions might ultimately affect the employment relationship.

Similarly, there is no merit to the allegation that the District's bargaining over said subjects in 1973 constitutes a waiver of the District's right to refuse to bargain over those subjects in 1975. For, if one were to accept the Association's waiver claim, that in effect would mean that once bargained for, permissive subjects of bargaining would have to be bargained for in the future merely because parties voluntarily agreed to engage in such bargaining in the past. If that were the law, it is not inconceivable that some parties would resist such initial bargaining because of their fear that it would constitute a permanent waiver of their statutory right to refuse to bargain over such subjects in the future. Thus, instead of encouraging collective bargaining over permissive subjects, the Association's view, if adopted, could well have the exact opposite result. 5/ Additionally, it is well established that a wavier of statutory rights will not be lightly inferred. Here, of course, there is no evidence of any kind that the District in 1973 intended to waive its statutory right to refuse to bargain over these matters in the future. Because of these considerations, there is no basis for finding the Association's claimed waiver.

The Association also contends that the District's refusal to bargain over the proposals herein "threatens the balance of (the collective bargaining) relationship as it has been worked out by the give and take of the parties themselves." In support thereof, the Association claims that it made concessions to the District in the 1973 negotiations in order to obtain contractual language providing for permissive subjects of bargaining. In fact, however, and other than the Association's assertion, there is no specific record evidence herein to establish that the Association made such concessions. Moreover, even if it did, the quid pro quo then agreed to was effective for only that period of time that the contractual provisions were in effect and it did not require the District to continue to bargain over such terms for the indefinite future, once those provisions expired. As a result, this claim must be rejected.

In summary, then, the Association has not presented any compelling basis for holding that an employer is required to bargain over permissive subjects of bargaining, merely because it once voluntarily agreed to do so some years earlier. Moreover, the Association has failed to proffer any case law, in either the public or private sector, which has squarely held that that is the law. Since the dichotomy between mandatory versus permissive subjects of bargaining centers on the fact that while parties may voluntarily agree to bargain over permissive subjects, they are not required to do so, it would be inappropriate to restrict such voluntary bargaining by providing in effect that once bargaining takes place it must continue into the indefinite future. As a result, and since a contrary ruling could easily impede initial bargaining from taking place, and because the Commission in the past has encouraged, but not required, parties to bargain over permissive subjects of bargaining 6/, the Examiner concludes that the District in collective bargaining negotiations was not required to bargain over the Association's proposals relating to permissive subjects of bargaining. Accordingly, this complaint allegation is hereby dismissed.

5/ In considering a similar argument, the Court in NLRB v. Davidson 53 LRRM 2462, 2467 CCA 4,(1963), noted this very possibility when it stated that "parties might feel compelled to reject non-mandatory proposals out of hand to avoid risking waiver of its right to reject."

6/ See Oak Creek, supra, and Beloit, supra.

2. The District's unilateral implementation of non-mandatory bargaining subjects.

It is undisputed that the District on September 2, the first day of the 1975-76 school year, unilaterally implemented certain policies regarding hours of work, class size, and staff development program. The Association does not contest the fact that such subjects are non-mandatory subjects of bargaining under Oak Creek, supra, and Beloit, supra. Similarily, it makes no claim that the District has refused to bargain over the impact of the decisions made in those areas. Rather, the Association primarily argues that the District is precluded from making such unilateral changes because: (1) the District has "dropped bargained subjects in key areas of employment"; (2) the areas in dispute had become part of the "basic employment status quo" by virtue of their inclusion in the prior contract; and (3) special considerations in public sector bargaining requires maintenance of the status quo.

With reference to point (1), it is true that the District's unilateral implementation in effect resulted in the dropping of certain subjects from the bargaining arena. However, and as noted above, that fact is not dispositive as an employer is not required to continue bargaining over permissive subjects of bargaining merely because it voluntarily agreed to engage in such bargaining initially. 7/ Furthermore, although the Association complains that these items have been dropped from the bargaining sphere, the fact remains that such subjects have been excluded from the bargaining process under Beloit, supra, and Oak Creek, supra. As a result, there is no legal requirement to the effect that once bargained for, such permissive subjects cannot be dropped from the bargaining arena in the future.

There is also no merit in the Association's point (2) which alleges that the District was precluded from altering the "employment status quo." In support of this proposition, the Association has cited numerous cases for its claim that an employer cannot unilaterally alter conditions of employment. Those cases are not controlling, however, as none involved the unilateral implementation of policies relating to permissive subjects of bargaining. Indeed, the Association itself acknowledges this fact in its brief by noting:

> "the exact holdings of these cases in the private sector do not specify the conclusion that the status quo of a non-mandatory subject in the contract must be maintained . . . ."

Nonetheless, the Association goes on to add that such cases do provide that the crucial question is whether a condition "has become sufficiently established in the employment operation to be regarded as a basic part of the status quo" and that if it is, then is "protected against unilateral change if it is either a mandatory subject . . . or is covered in the expired contract . . . ."

In considering this theory, there is no question but that some permissive subjects of bargaining, either directly or indirectly, can affect working conditions, and that they do form part of the employment relationship. But, and as noted above, the fact remains that certain subjects are outside the bargaining area, irrespective of whether they might affect working conditions, and irrespective of whether they form part of the employment relationship. The Association's contrary allegation is therefore rejected.

7/ The Association's reliance on cited case law in support of this claim is misplaced as none of those cases dealt with the continuing duty to bargain over permissive subjects.

Left, then, is the Association's claim that "special bargaining conditions in public sector in Wisconsin require maintenance of the status quo." In support of this view, the Association notes that since public employes in Wisconsin are prohibited from striking,

> "We should therefore be very wary in adopting uncritically precedents from the private sector which may be based at least partly on a balance with the fundamental right of those employees to strike."

As noted at the very outset of this discussion, this point is a valid one, since the absence of the right to strike in the public sector does affect the fundamental balance of power between unions and employers. That being so, it is necessary to determine what public policy should be followed in Wisconsin with respect to a public employer's unilateral implementation of permissive subjects of bargaining.

In support of its contention that such implementation should be prohibited, the Association cites considerable authority arising out of other jurisdictions, particularly Minnesota and New York. As to the New York experience, the Association relies heavily upon the holding of the New York Public Employment Relations Board in its Triborough Bridge 8/ decision wherein it was held that:

> "the statutory prohibition against an employee organization resorting to self help by striking imposes a correlative duty upon a public employer to refrain from altering terms and conditions of employment unilaterally during the course of the negotiations. This duty of an employer in the public sector to refrain from self help is greater than is the similar duty of private sector employers."

But, the Association fails to also note that the Triborough Bridge, supra, doctrine has been rejected by numerous courts in New York. 9/ Moreover, while the decision in other jurisdictions may be interesting and should be considered, the fact remains that they are not binding in Wisconsin and that, ultimately, it is the Commission itself which must decide that the law should be in Wisconsin.

In this connection, the Association argues that the Commission in Racine Unified School District No. 1, 10/ has held that an employer cannot unilaterally alter "working conditions." However, Racine, supra, is inapposite as it did not involve unilateral changes in permissive subjects of bargaining. Instead, it centered only on the implementation of changes affecting mandatory subjects of bargaining. Furthermore, the employer in Racine, supra, did not discuss with the union the unilateral changes that it made. Here, the District and the Association did discuss the bargainability of the subjects in dispute, both before, and after those policies were implemented. Indeed, Gibson testified that "for sure we were at impasse over the hours of work and class size from our prospective." 11/ In light of these

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8/ Triborough Bridge and Tunnel Authority PERB No. U-O 362, 5 N.Y. PERB 3037 (1972).

9/ See, for example, Betts V. Teachers Assn., 92 LRRM 3132 (1976), and the cases cited therein.

10/ Decision No. 11313-B, D (4/74).

11/ Transcript, p. 45.

factual differences, the Commission's holding in Racine, supra, is not controlling.

We are left, then, with the penultimate question of what the policy should be in this area. If one were to accept the Association's theory, that would mean that an employer at the termination of a contract could not unilaterally implement any policies relating to permissive subjects of bargaining which affected working conditions, and that the terms of the expired contract relating to such subjects would have to continue. As noted below, the Association similarly argues that the mandatory subjects of bargaining provided for in the terminated contract would also have to continue. Taken together, the Association therefore argues in effect that all provisions of a terminated contract should continue past the contract's termination date.

One major difficulty with that result is that it negates the express agreement of both parties that the contract would terminate on a certain date. In the fact of such an agreement, how can the Commission, sua sponte, extend all of the contractual provisions, especially where, as here, there is no evidence that the Association even offered to extend the contract after its termination date.

Furthermore, the Association's view, if accepted, would lead to a situation where unions would be guaranteed all of the benefits of the expired contract, while at the same time they would not be required to give up anything in return. Since the termination of a contract normally puts pressure on parties to reach a new agreement, continuation of the expired contract, in its entirety, might well relieve unions of that pressure. This is so because some unions in that situation might not feel any pressure to settle upon a new contract because of their knowledge that they could hold out for their positions indefinitely, while at the same time enjoying the full benefits of the expired contract. One court has correctly described such a result as placing unions "into a guaranteed gain position, and the employers in an assured losing stance." 12/ Put another way, the Association's view in effect boils down to a "heads I win, tails you lose" situation. As such a result could create an imbalance in the bargaining relationship of the parties, and as that imbalance might well impede meaningful bargaining, the Association's theory must be rejected.

At the same time, however, care must be taken before one automatically assumes that all contractual provisions, including those pertaining to mandatory subjects of bargaining, expire upon a contract's termination, and that an employer has carte blanc to determine what contractual provisions shall remain in effect. For, if that were the law in the public sector, a very substantial imbalance would be created in favor of the employer, as an employer could unilaterally abrogate all contractual provisions and concommitant working conditions in order to pressure a union into accepting a settlement which is favorable to the employer. The union, on the other hand, which is prohibited from striking, is left with few, if any, legal weapons tocounteract such a tactic. While, of course, it is not the function of the Commission to regulate with mathematical percision the relative bargaining power between parties, it is the Commission's responsibility to consider the effects that its decisions may have in this area. That is particularly the case where, as here, the Commission must decide what unilateral changes can be made by an employer in matters affecting wages, hours and conditions of employment.

12/ Cardinale v. Anderson, 84 LRRM 2268 (1973).

One way to avoid either of the two above extremes is to hold that some, but not all, parts of a contract lapse on the contract's expiration and that an employer can unilaterally implement some, but not all, policies which relate to wages, hours or conditions of employment. Generally speaking, this is the approach which has been taken by the National Labor Relations Board, herein the Board, in its administration of the National Labor Relations Act, as amended. 13/ If such an approach were adopted under MERA, it would be necessary to determine whether a particular contractual provision, based upon the unique facts of a given case, should, or should not, continue in effect.

Here, the items in dispute involve permissive subjects over which there is otherwise no mandatory duty to bargain. There is less reason, therefore, to hold that those items survive a contract's termination as opposed to those subjects which do entail a mandatory duty to bargain. Moreover, inasmuch as an employer can otherwise unilaterally implement policies in these areas under Oak Creek, supra, and Beloit, supra, there is no persuasive reason as to why an employer should not have that same latitude at the expiration of a contract. Accordingly, and in order to avoid the extreme result advocated by the Association, under which all provisions of an expired contract would continue indefinitely the Examiner concludes that the District was not required to adhere to the provisions of the expired contract which pertained to non-mandatory subjects of bargaining, irrespective of whether the parties were at impasse over those subjects. 14/ Furthermore, since an employer is otherwise not required to bargain about its decisions in such areas, the District here at the expiration of the contract was similarly entitled to unilaterally adopt policies relating to non-mandatory subjects of bargaining. These complaint allegations are therefore dismissed.

3. The District's refusal to process a grievance through the contractual grievance/arbitration procedure.

As noted in paragraphs 15, 16 and 17, of the Findings of Fact, it is undisputed that the District refused to process a grievance to arbitration which related to the District's unilateral implementation of certain policies pertaining to permissive subjects of bargaining.

13/ See, for example, A.V. Corporation, 209 NLRB 451, 453, wherein the NLRB held:

> "generally, absent impasse, an employer may not unilaterally implement its proposals which are under discussion. This rule is not, however, absolute. Thus, as noted by the Supreme Court in N.L.R.B. v. Benne Katz et al., d/b/a Williamsburg Steel Products Co., a case involving unilateral employer action during negotiations without prior notice to the union, 'there might be circumstances which the Board could or should accept as excusing or justifying unilateral action.' In this regard, the Board has in the past found such justification by reason of necessity and by waiver or acquiescence of the union. In the circumstances of this particular case, we conclude that such justification existed." (Footnote citations ommitted).

14/ Here, as noted above, Gibson claimed that the parties had reached impasse on some of the items in dispute. Normally, it is a prohibited practice for a party to insist to point of impasse on such permissive subjects of bargaining. Because of that, it would be incongruous to require that an employer cannot unilaterally implement permissive subjects of bargaining unless the parties first reach impasse on such items. Additionally, since no complaint has been lodged against the Association alleging that the Association caused that impasse and that, therefore, said conduct constitutes a prohibited practice, it would be inappropriate to rule on this issue.

That grievance was filed on September 10, some four weeks after the August 14 termination date provided for in the 1973-75 contract, and it centered around certain District actions which occurred after that contract's termination date. Further, while the parties discussed some modification of the grievance-arbitration procedure in their collective-bargaining negotiations, it appears that the parties were able to resolve the bulk of those differences by September 10, so that as of that date there was no impasse between the parties over this issue. 15/ The precise issue herein, therefore, is whether, absence of such an impasse, the District was required to process a grievance to arbitration when said grievance was filed after the contractual termination date and when the grieved event also occurred after the termination date.

On this point, the Commission has long held that employers in the private sector are not required to arbitrate such grievances under WEPA. 16/ As to public employment, however, the Commission apparently has not squarely ruled on this issue. The Commission has held that a public employer must arbitrate grievances when the parties have agreed that certain parts of their collective bargaining agreement would continue in effect past the contractual termination date. 17/ But here, the parties have not agreed that parts of their contract should be so extended. As a result, the Commission's holding in Sawyer County, supra, is not controlling.

That being so, it must therefore be decided whether the Commission's ruling in the private sector on this issue should be transferred to the public arena. Arguing against such a result, the Association basically 18/ asserts in its brief that:

> "the major rationale for the holding that an arbitration clause automatically falls with the expiration of a contract although a grievance procedure survives, is the fact that in the private sector the concomitant agreement of the union not to strike, has automatically dropped as well. Under the MERA in Wisconsin, the expiration of a contract does not restore to public employees the right to strike, because that is denied them by law. Thus, it is logical to hold that the binding arbitration provision should be maintained just as are other sections of the contract, and that it certainly should be treated the same as the rest of the grievance procedure."

The Association does correctly point out that a no-strike pledge is the quid pro quo for an arbitration provision in the private sector. 19/ Since public employes are prohibited from striking, it is fair to ask why public employes should be deprived of the right to

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15/ Gibson's testimony that there was no impasse in this issue was not challenged by the District.

16/ See, for example, Splicewood Corporation (Decision No. 3139) 5/52; Giant Grip Mfg. Co. (Decision No. 2318), 2/50; and Lullabye Furniture Corp. (Decision No. 3279) 10/52.

17/ Sawyer County Highway Comm., Decision No. 13604-B, (2/76).

18/ In this connection, the Association contends that the Commission's decision in Racine, supra, supports such a result. That case only involved an employer's unilateral changes in the grievance-arbitration procedure after the contract had terminated; it did not center on the employer's duty to follow the previously established contractual grievance-arbitration procedure.

19/ See, for example, Lucas Flour Co. 369 U.S. 95 and Boys Market Inc., 395 U.S. 235.

arbitrate. While the Association's position may appear reasonable at first glance, there are a number of difficulties in accepting it.

For example, while the Association now claims that a no-strike pledge is the quid pro quo for an arbitration provision, the fact remains that there is no evidence in the instant record to establish that the Association ever offered to extend its contractual no-strike pledge in exchange for the District's committment to arbitrate grievances which might arise after the contract's termination. Such a contractual pledge is, of course, important to an employer as it may accord an employer the opportunity to arbitrate the question of whether a union can be held liable for damages if it violates a no-strike prohibition. Moreover, the existance of a contractual no-strike clause may also enable an employer, in certain circumstances, to come before either the Commission or courts in an attempt to secure the enforcement of such a contractual requirement. It is for reasons such as these, then, that public employers generally attempt to obtain a contractual no-strike prohibition. Here, however, there is no evidence that the Association ever offered to extend its no-strike pledge in exchange for the right to arbitrate grievances arising during contractual hiatus.

More importantly, there is no merit to the claim that the statutory strike prohibition for public employes is the quid pro quo for a contractual agreement to arbitrate. This is so because the strike prohibition and an arbitration proviso in the public sector arise out of two totally dissimilar contexts. Arbitration, for example, is totally voluntary in that parties agree among themselves to such a mechanism for the resolution of their disputes. The statutory no-strike prohibition, on the other hand, has been mandated as a matter of public policy by the State of Wisconsin. Therefore, since the later policy exists independently of any contractual provision, there is no basis for finding that a contractual arbitration provision, voluntarily agreed to, is necessarily related to the statutorily mandated no-strike prohibition.

Additionally, it is important to remember that even in the absence of an arbitration provision, public employes in Wisconsin can nonetheless come before the Commission for the purpose of complaining about certain employer actions which occur after a contract's termination. For example, a union in the public sector can always file refusal to bargain changes over an employer's alleged unilateral changes. Indeed, the Association has done just that in the present case. Furthermore, and assuming arguendo that certain contractual provisions relating to mandatory subjects of bargaining can extend past a contract's termination date 20/, a union can contest an alleged contractual breach under Section 111.70(3)(a)1 and 5 of MERA. While these statutory complaint procedures may in some cases be more time consuming and costly than arbitration proceedings, they nonetheless do accord a union the opportunity to fully litigate issues which arise after the expiration of a contractual arbitration procedure.

In such circumstances, where a union does have access to the statutory framework for the resolution of its disputes, and where there is no basis for finding that the statutory no strike prohibition is the quid pro quo for the contractual right to arbitrate, the Examiner concludes that the conscentual right to arbitrate should not be extended

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20/ But for the grievance-arbitration procedure and the contractual provisions relating to permissive subjects of bargaining noted above, the instant case does not involve the question of what particular parts of a terminated contract, if any, survive a contract's termination. Accordingly, nothing contained herein should be construed as providing that any provisions of a contract can be so extended.

past a contract's termination date, unless the parties mutually agree to do so. To hold otherwise would turn a voluntary process into an involuntary one and it would be a direct repudiation of the well established concept that arbitration is a completely voluntary process in that it rests entirely upon a contractual basis. Accordingly, based upon the above noted considerations, the District here was not required to arbitrate a grievance which was filed and which arose over a fact that occurred after the contract's termination. 21/

In so finding, the Examiner is aware of the Association's additional claim that the retroactivity provision of the 1975-77 contract provides for such arbitrability. In support of this view, the Association points out that the 1975-77 contract is retroactive to August 14, 1975, that there was no discussion among the parties in negotiations to the effect that such retroactivity would exclude the grievance-arbitration procedure, and that, according to the Association's brief, that procedure "applied retroactivity to events which occurred during the hiatus, regardless of their status prior to the actual execution."

In considering this claim, it must be noted that the Association does not claim that the parties ever expressly agreed to such a result. To the contrary, since the Association concedes that the parties did not even discuss this issue, it is clear that the Association's claim rests entirely on the theory that the parties have implicitly agreed to the position it now advances. Absent such discussions, it is inherently implausible that the parties intended for such retroactivity when it is remembered that the Association's November 5, 1975 amended complaint on this very issue was pending before the Commission at the time that the contract was agreed to. For, if both parties in fact mutually intended that the grievance-arbitration procedure should be retroactive, it is only reasonable to assume that they would have at least discussed a possible withdrawal of the Association's complaint allegation regarding the District's refusal to arbitrate. As the record here fails to establish that there were such discussions, it is reasonable to infer the parties never intended that the retroactivity provision would encompass the issues raised in the Association's then pending complaint. Indeed, this point is reflected by Gibson's own testimony to the effect that he "had no understanding and that the question never came to my mind" as to whether the arbitration provision would be retroactive. Moreover, in considering the Association's claim, it must be remembered that the District has a statutory right to refuse to arbitrate such grievances arising out of the contractual hiatus. Since a waiver of such statutory rights must be clear and unequivocal, and because no such waiver here exists, there is no basis for finding that the District has waived its statutory right to refuse to arbitrate such grievances. Accordingly, it must be concluded that there was no mutual agreement under which the

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21/ This ruling, which is limited to the facts herein, does not conflict with the well established principle that an employer must arbitrate a grievance which arises before a contract's termination, irrespective of whether the contract terminates by the time that the grievance is ripe for arbitration. See, for example, Abbotsford Public Schools Jt. School District No. 1, Decision No. 11202-A, C (3/73).

retroactivity proviso would provide for arbitration of grievances arising during the contractual hiatus.

Absent such agreement on retroactivity, and because, for the reasons noted above, an employer is not required to arbitrate a grievance which arose after a contract's termination, the complaint allegation to this effect is hereby dismissed.

Remaining is the related, but separate, question of whether the District properly abrogated the grievance (as opposed to arbitration) procedure after the expiration of the contract.

In this connection, it can be agreed that the grievance procedure is part and parcel of the same mechanism which provides for arbitration and that since the latter expires at the termination of a contract, then it follows a fortiorai that the underlying grievance steps likewise fall.

While this argument may appear plausible, the fact remains that the grievance and arbitration procedures, although related, are separate and independent from each other and that, as a result, they must be treated differently. For, whereas arbitration is entirely voluntary, the correlative right to grieve is expressly provided for in Section 111.70(4)(d) of MERA, which provides in part:

> "Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employes in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences."

Additionally, Section 111.70(2) of MERA, which is incorporated into Section 111.70(3)(a)1 of MERA, states that employes have the right to engage in "concerted activities for . . . mutual aid or protection . . . ." It is well established that the phrase "concerted activites" encompasses employe complaints, and that such complaint can be lodged even though there is no union on the scene. Furthermore, the Commission itself has noted the importance of this right when it held that the right to file a grievance under a contractual grievance procedure "is a fundamental right included within the employees' right to representation". 22/ In light of the above, it is clear that the right to grieve is a fundamental right, and that, as such, it stands on a different footing that the contractual right to arbitrate which arises only when the parties voluntarily agree to do so. 23/

Here, as noted above, the District unilaterally abrogated the entire contractual grievance procedure at the termination of the contract, even though the parties had not reached any impasse 24/ on that procedure in their prior collective bargaining negotiations. Since a grievance procedure constitutes a condition of employment over which an employer has a mandatory duty to bargain, it follows that, absent impasse on this issue, an employer cannot unilaterally alter such a condition of employment without violating the duty to bargain provided for in Section 111.70(3)(a)4 of MERA. In this connection, it is true that here, unlike Racine, supra, the District did not

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22/ Village of West Milwaukee, Decision No. 9845-B (10/71).

23/ See, for example, Hilton Davis - Chemical Co., Division of Sterling Drug, Inc., 185 NLRB 241.

24/ While the parties did not agree to certain editorial changes in the grievance procedure until after the contract terminated, Gibson testified without contraction that the parties had never reached impasse over the grievance procedure.

unilaterally implement a formalized procedure to replace the one provided for in the expired contract to that extent the cases are somewhat distinguishable . Nonetheless, the fact remains that by abrogating the contractual system, the District did require its employes to grieve through other channels, channels which are set forth in its September 25 letter to the Association. By so abrogating the contractual provision and by forcing employes to grieve through other means, the District thereby unilaterally established new conditions of employment and itthereby breached its duty to bargain as provided for in Section 111.70(3)(a)4 of MERA. This is so irrespective of whether Wescott's grievance was meritorious, as the legality of such unilateral establishment of working conditions is not contingent upon the relative merits of that grievance. Furthermore, since the issues raised in that grievance have been fully litigated in the instant proceeding, it would be inappropriate to now order that that grievance be considered by the District. Instead, to rectify its conduct, the District is required to only take the remedial action noted above.

Dated at Madison, Wisconsin this day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner