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-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, REVISING CONCLUSIONS OF LAW AND REVISING ORDER

Examiner Amedeo Greco having, on October 5, 1976, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled proceeding, wherein the above-named Respondent was found not to have committed certain prohibited practices in certain respects, but was found to have committed a prohibited practice within the meaning of the Municipal Employment Relations Act by unilaterally altering a previously established grievance procedure; and the above-named Complainant having timely filed a petition pursuant to Section 111.07(5) of the Wisconsin Statutes, requesting review of the Examiner's decision on the basis that it was dissatisfied therewith, and the above-named Respondent having filed a response thereto; and the Commission having reviewed the Examiner's decision, the petition for review and the response thereto;

NOW, THEREFORE, it is

ORDERED

That, pursuant to Section 111.07(5) of the Wisconsin Statutes:

1. The Examiner's Findings of Fact are hereby affirmed;

2. Paragraphs 1 through 4 of the Examiner's Conclusions of Law are hereby affirmed;

3. Paragraph 5 of the Examiner's Conclusions of Law is hereby revised to read as follows:

"5. That the District violated Section 111.70(3)(a)1 and 4 of MERA by establishing a new grievance procedure without first negotiating same with the Association either to an agreement thereon or until after the parties have reached an impasse thereon."

4. Paragraphs 1 and 2 (b) and (c) of the Examiner's Order are hereby affirmed;

5. Paragraph 2 (a) of the Examiner's Order is hereby revised to read as follows:

"2.(a) Cease and desist from establishing a new grievance procedure without first negotiating same with the Association either to an agreement thereon or until after the parties have reached an impasse thereon."

6. Appendix "A" attached to the decision of the Examiner is hereby amended to read as follows:

"NOTICE TO ALL EMPLOYES

PURSUANT TO THE 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 establish a new grievance procedure without first negotiating same with the Association either to an agreement thereon or until after the parties have reached an impasse thereon.

Dated this ________ day of ______________________, 1977.

By ______________________________
For the School Board, District No. 6, City of Greenfield"

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of November, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

GREENFIELD SCHOOL DISTRICT NO. 6, XXXV, Decision No. 14026-B

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
REVISING CONCLUSIONS OF LAW AND REVISING ORDER

THE ORIGINAL PLEADINGS:

In its complaint initiating the instant proceeding, the Association contended that the District committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) by refusing to collectively bargain with the Association over certain proposals to be included in a successor collective bargaining agreement and which proposals covered matters which were permissive, rather than mandatory, subjects of bargaining. The Association further contended that the District by unilaterally implementing certain policies relating to such permissive subjects of bargaining also committed a prohibited practice. The Association also alleged that the District, by refusing to process a grievance committed an additional prohibited practice. In its answer, the District alleged that it committed no prohibited practice, contending that the matters on which it refused to bargain were not mandatory subjects of bargaining, that it had a right to unilaterally implement policies relating to such subject matters, and further, that the grievance involved arose during the period in which no collective bargaining agreement existed.

EXAMINER'S DECISION:

After hearing, the Examiner concluded that the District had committed no prohibited practice with regard to its refusal to bargain over the permissive subjects of bargaining or unilaterally implementing policies relating to such subjects. In reaching such conclusion, the Examiner determined that the mere fact that the previous collective bargaining agreement contained proposals with respect to such permissive subjects, did not constitute a waiver of the District's right to refuse to bargain with respect to such subjects in negotiations leading towards a successor agreement.

Since the subject matters involved covered non-mandatory subjects of bargaining, the Examiner found that the District was not required to adhere to the provisions of the expired contract which pertained to such non-mandatory subjects of bargaining and therefore, the District did not commit a prohibited practice by unilaterally changing its policies with regard to such matters.

Further, the Examiner concluded that the District did not commit a prohibited practice by refusing to process a grievance to arbitration, on the basis that the subject matter of the grievance had arisen after the termination date of the collective bargaining agreement. However, the Examiner concluded that the District refused to bargain collectively within the meaning of Section 111.70(3)(a)4 of MERA by unilaterally altering the previously established grievance procedure.

THE PETITION FOR REVIEW:

Following the issuance of the Examiner's decision, the Association timely filed a petition for review, pursuant to Section 111.07, Wisconsin Statutes wherein it indicated that it was dissatisfied with the Examiner's decision, and in support thereof submitted copies of briefs which had originally been submitted to the Examiner prior to the issuance of his decision.

In responding to the Association's petition for review, the District, by letter over the signature of its Counsel, set forth that the decision of the Examiner was supported by the pleadings, the record established

at the hearing, and the legal authority relied upon by the Examiner, and the District urged that the Commission sustain the Examiner's decision. Approximately some five months after the filing of the petition for review and the briefs as noted above, Counsel for the Association directed a letter to the Commission calling the Commission's attention to a March 7, 1977 decision issued by the U.S. Supreme Court, namely, Nolde Bros., Inc. vs. Local 358 Bakery and Confectioners Workers Union, AFL-CIO, 97 S.Ct. 1067 (1977). Approximately one month later in response to such letter, Counsel for the District, in response to the argument contained in the letter above-noted, maintained that the case cited by Association's Counsel was not in point.

DISCUSSION:

Although the Commission has affirmed the Examiner's Findings, Conclusions and Order as modified 1/ we feel compelled to expand on parts of his rationale and to disagree with other parts.

Duty to Bargain Over Permissive Subjects Contained in the Expired Collective Bargaining Agreement

We agree with the Examiner's rejection of the Association's argument that the District, by having included permissive subjects in the expired collective bargaining agreement, must bargain over such subjects in the future as having become mandatory subjects of bargaining. Subsequent to the Examiner's decision herein, the Commission expressly rejected this argument in City of Wauwatosa. 2/

The Association argues that the quid pro quo, which it surrendered to induce the District's concession on the permissive subjects, requires that the permissive subject thereafter be treated as a mandatory subject of bargaining. Essentially this argument requests the Commission to determine the adequacy of the consideration and balance the mutual exchange of consideration, a function which belongs entirely to the parties at the bargaining table. Even the consideration extended to induce an employer's concession on mandatory items is subject to the employer's right, after expiration of the contract and upon discharge of its duty to bargain, to make unilateral changes in such mandatory subjects. Labor organizations, in extending consideration to induce employer concessions on permissive subjects, must assume responsibility for weighing the value of the consideration extended in light of the employer's right unilaterally to alter such permissive subjects on termination of the agreement.

Because of the importance of the point in regard to implementing the overall legislative purpose to encourage successful bargaining, we repeat the Examiner's observation that the effect of the rule proposed by the Association would deter employers from bargaining over permissive subjects. Such deterrence, in the Commission's opinion, would be to the substantial detriment of achieving voluntary settlements in collective bargaining.

We do not share the Examiner's reasoning that to require the District to bargain to impasse over permissive items would deter unions from serious bargaining if they knew contractual terms would continue, nor do we agree

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1/ The Commission has modified the Examiner's Conclusions of Law and Order to clarify the extent of the District's obligation not to change working conditions after the expiration of the collective bargaining agreement until it has negotiated to the point of agreement or impasse with regard to any proposed change.

2/ Decision No. 15917, 11/77.

that requiring adherence to those terms would have the Commission sua sponte extend a contract's expiration date. First, employers already have an obligation, relative to most mandatory subjects of bargaining, to maintain the status quo of employment conditions after expiration of the agreement, pending discharge of its bargaining obligation, and unions are not disinclined to bargain seriously because of this rule. They invariably seek improved conditions in a new agreement, and this desire would not be significantly diminished by including permissive items in the status quo rule. Second, most mandatory subjects of bargaining must remain intact per the terms of the expired contract, not because the Commission sua sponte extends contractual terms, but as a result of the employer's duty to maintain the status quo at least to the point of impasse, in respect to such mandatory subjects as being an inseparable part of the employer's duty to bargain over changes in mandatory subjects of bargaining. In the case of permissive subjects of bargaining, however, there is no such bargaining duty, and an employer's agreement on a permissive item subordinates its otherwise absolute discretion in respect thereto only to the extent provided in the collective bargaining agreement.

Abrogation of the Arbitration Procedure Contained in the Expired Collective Bargaining Agreement

We agree with the Examiner that the District was free not to follow the arbitration provisions of the expired collective bargaining agreement. 3/

In arriving at this conclusion, we begin with the general rule that an employer must, pending discharge of its duty to bargain, maintain the status quo of all terms of the expired agreement which concern mandatory subjects of bargaining. 4/ Thus, even though the amount of wages owing originally was established by the expired agreement, an employer may not change the established wage rates without first discharging its duty to bargain over that item. This general rule, however, is subject to various

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3/ We do not rely on the Examiner's rejection of the Association's argument that the successor agreement applied to the hiatus retroactively. The merits of that argument belong to the arbitrator contracted for in the collective bargaining agreement. We here decide the scope of the duty to bargain, not the meaning of the successor agreement.

4/ See NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). Also see NLRB v. Frontier Homes Corp., 371 F.2d 974, 64 LRRM 2320, 2324 (8th Cir. 1967):

> "The expiration of the contract would permit the Company to negotiate for a new and different layoff arrangement, but would not allow it to institute a unilateral change on this mandatory bargaining issue without negotiating. The entire operation of the Company, including precedent, custom, tradition and contract, must be viewed in establishing the industrial pattern of its operation. Any changes affecting matters of mandatory bargaining . . . must be negotiated out, or at least until an impasse is reached. * * * Expired contract rights affecting mandatory bargaining issues, therefore, have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the status quo of the entire plant operation."

exceptions, 5/ and an arbitration provision in an expired agreement is one of the well-recognized exceptions. 6/

Although the issue whether to agree to an arbitration provision is a mandatory subject of bargaining, the duty to arbitrate is wholly contractual. 7/ Recognizing that the case law from the private sector has limited applicability to the extent it is based on the coterminous right of employes to strike, a right not enjoyed by public sector employes, nevertheless the power of an arbitrator is solely dependent on the terms of an agreement, 8/ and the arbitrator's responsibility is to construe a contract. 9/ If the contract has expired, the arbitrator has no powers and nothing to construe in respect to post-expiration contractual obligations. 10/

Abrogation of the Grievance Procedure in the Expired Collective Bargaining Agreement

Unlike an arbitration provision, however, the grievance procedure comes within the rule that an employer must maintain the status quo of conditions contained in the expired agreement. Although utilization of the grievance procedure upon expiration of the agreement cannot culminate in

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5/ See note 13 in the Examiner's decision.

6/ See Hilton-Davis Chemical Co., 185 NLRB No. 58, 75 LRRM 1036 (1970). The Association's reliance on Unified School District No. 1 of Racine County (11315-B and D), 4/74, is misplaced. The Examiner expressly said: "This is not to say that the agreement to arbitrate grievances was a 'working condition' which the Respondent was bound to honor during the hiatus. There was no enforceable agreement on August 28, 1972 and the Respondent was clearly not bound on that date to arbitrate a grievance arising during the hiatus." The Commission affirmed in regard to this point. Moreover, the Association's reliance on Nolde Bros., supra, 97 S.Ct. 1067, also is misplaced. The Court held arbitrable a grievance arising after the expiration of the agreement on the basis of the language in that agreement. This case does not concern arbitrability; it concerns whether arbitration is within the status quo rule as a result of the employer's duty to bargain. See dissent in Nolde, 97 S.Ct. at 1075.

7/ ". . . [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Steelworkers v. Warrior Navigation Co., 363 U.S. 574, 582, 46 LRRM 2416 (1960).

8/ "An arbitrator obtains his authority from the contract . . . ." WERC v. Teamsters Local No. 563, 75 Wis. 2d 602, 613, 250 N.W. 2d 696 (1977).

9/ ". . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement . . . ." Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

10/ Whereas Nolde, supra, dealt with a grievance arising after the expiration of the agreement, the Court held it arbitrable on the question whether the expired agreement itself intended to cover such post-expiration events. Thus, the Court's decision dealt with the original contractual obligation. Here, the Association asks the Commission to create a non-contractual obligation as to post-expiration events. It is because the extent of the obligation is wholly contractual that the Commission cannot do so. See also Splicedwood Corp. (3139) 5/52; Pierce Mfg. Co., (9549-A) 8/71; Napiwocki Construction Co. (11941) 3/76, as to effect of expired agreement.

final and binding arbitration, for the noted reasons peculiar to the wholly contractual nature of arbitration, the grievance procedure is the established channel for discussing employe dissatisfactions respecting the established terms and conditions of employment about which the employer mandatorily is required to bargain. The grievance procedure, upon expiration, becomes the vehicle for bargaining over employe dissatisfactions. 11/ After contract expiration, the grievance does not concern the employer's contractual obligations, but rather the employer's duty not to change established terms until it discharges its duty to bargain about those proposed changes, and the grievance procedure itself is the established mechanism for resolving alleged departures from the established terms and conditions. A contrary holding, that the established mechanism for day-to-day dispute resolution evaporates on contract expiration, would exacerbate tensions in the employment relationship as the parties seek a successor agreement and, the Commission is persuaded, would gravely frustrate the overall legislative objective to secure labor peace.

We do not, however, adopt the Examiner's reliance on Section 111.70(4)(d)1 of MERA as establishing that an employer may not unilaterally abolish a grievance procedure. As noted, we rely on the rule that the employer must maintain the status quo as part of its duty to bargain about mandatory subjects. The function of Section 111.70(4)(d)1 is entirely different. Rather than requiring an employer to maintain a particular grievance procedure after contract expiration, this subsection functions to excuse an employer from the charge of failing to bargain exclusively with the union by dealing with employes individually over their grievances. The United States Supreme Court, in construing the parallel federal provision, stated: 12/

> "Respondent clearly misapprehends the nature of the 'right' conferred by this section. The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative . . . . The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation. . . ."

11/ Cf. City of Clintonville (12186-B, C), 8/74, enforced, WERC v. Clintonville, No. 12723, Waupaca Circuit Court, June 16, 1975. See Hilton-Davis Chemical Co., 185 NLRB No. 58, 75 LRRM 1036, 1038 (1970): "Applying these principles to the hiatus which sometimes exists . . . between the expiration of one agreement and the reaching of a new one, it follows that employers and unions must continue to meet and confer and to seek agreement in good faith, not only over the terms and conditions of a proposed new agreement, but also over employee grievances which may arise during such hiatus. * * *

"Kingsport did not involve a failure to arbitrate, but rather a failure to follow established channels for discussion (really bargaining over employee grievances.)"

Also see Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615, 53 LRRM 2878, 2882 (3rd Cir. 1963), cert. denied, 375 U.S. 984 (1964): "The vice in this was not the refusal to comply with the provisions of an agreement which had already expired, but the unilateral . . . substitution of a new employer-devised grievance procedure in lieu of the one which existed under the expired contract."

12/ Emporium Capwell Co. v. Western Addition Commun. Org., 420 U.S. 50, 61 (1975), n. 12.

In affirming the Examiner's conclusion of law as amended that the District breached its duty to bargain by establishing a new grievance procedure, we must explain the precise basis for our action. Since the grievance filed was in protest over the District's changes of permissive subjects of bargaining, the District was free to abolish the grievance procedure as to those permissive items. The District is required to follow the previous procedure only in respect to grievances involving mandatory subjects of bargaining. Since the District could abrogate the previous procedure respecting permissive items, it could establish a different procedure unilaterally.

On the record, the District's announcement of the changed procedure was made in response to the grievance over changes in permissive subjects. Had the District gone no further, there would have been no violation. However, the District also directed that the new procedure be used for salary disputes as well, which unquestionably involves a mandatory subject of bargaining.

Accordingly, the violation consists in the District's unilateral rejection of the previous procedure and institution of a new procedure respecting grievances over mandatory subjects of bargaining, and it is on this basis that we affirm the Examiner.

Dated at Madison, Wisconsin this 18th day of November, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner