STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OAK CREEK EDUCATION ASSOCIATION, Complainant, vs. BOARD OF EDUCATION, OAK CREEK-FRANKLIN SCHOOL DISTRICT NO. 1, Respondent.	:	Case VIII No. 19657 MP-520 Decision No. 14027-A

Appearances:
Perry and First, Attorneys at Law, by Mr. Richard Perry, Esq. and Mr. Arthur Heitzer, Esq., appearing on behalf of the Complainant.
Mulcahy and Wherry, Attorneys at Law, by Mr. Mark J. Vetter and Mr. John F. Maloney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Oak Creek Education Association having filed an amended prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Board of Education, Oak Creek-Franklin School District No. 1 has committed a prohibited practice within the meaning of Section 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 24, 1975, before the Examiner; and the parties having filed briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Oak Creek Education Association, herein the Association, is a labor organization and at all times material herein was the exclusive bargaining representative of certain non-supervisory and non-administrative classroom teachers, librarians and counselors employed by the Board of Education, Oak Creek-Franklin School District No. 1; and that the Association's principal office is at Suite 301, 10201 West Lincoln Avenue, West Allis, Wisconsin.

2. That Board of Education, Oak Creek-Franklin School District No. 1, herein the District or Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of MERA; that the District's principal office is located at 340 East Puetz Road, Oak Creek, Wisconsin; and that the District is engaged in the providing of public education in the Oak Creek-Franklin, Wisconsin, area.

3. That at all times material herein, the Association has been the certified bargaining representative for the employes in the above described unit; that the Association and the District have been privy to a series of collective bargaining agreements; that the parties engaged in collective bargaining negotiations in 1973 for a successor contract;

that the parties then disagreed as to whether certain Association proposals constituted mandatory subjects of bargaining under MERA; and that the District on April 20, 1973, petitioned the Commission to issue a declaratory ruling as to whether the District was legally required to bargain with the Association on certain enumerated subjects such as class size, contact hours, committee on resource centers, additional librarians, pilot program for emotionally disturbed students, curriculum, maintenance of standards of students, regulation of other staff, in-service programs, job description of unit chairmen, clerical aides, and department heads.

4. That while the District's above noted petition was pending before the Commission, the parties continued to discuss the Association's proposals relating to the above noted subjects; that throughout those discussions, the District maintained that it would not bargain over those subjects; and that the parties on September 5, 1973, executed a "Memorandum of Agreement" which provided:

> "The undersigned parties hereby agree that any matters bargained and/or agreed to in no way constitute a waiver of their respective positions as to the Oak Creek-Franklin declaratory ruling pending before the Wisconsin Employment Relations Commission."

5. That after the aforementioned memorandum was agreed to, the District agreed to and did bargain about the subjects then in dispute; that the parties subsequently executed a collective bargaining agreement which was effective from August 15, 1973 through August 14, 1975; that said contract contained numerous provisions relating to areas which were the subjects of the pending declaratory ruling; that, for example, Article XXI, of said contract, entitled "Teaching Conditions", provided for class size, contact minutes, preparation periods and curriculum development; that Article XXVII of the contract, entitled "Clerical Aides", provided for clerical aides; that Article XXIX of the contract, entitled "Curriculum Council", provided for a curriculum council; and that Section 17.6 of Article XVII, entitled "Extra-Curricular Payment Schedule", related to department chairmen.

6. That Article XXV of said contract, entitled "Duration of Agreement", provided in part that:

> "Section 25.3. If any party desires to modify or amend this agreement, it shall deliver a written request therefor to the other party not less than sixty (60) days prior to the end of any such contract period. Such request shall provide in detail the nature and extent of the modification or amendment desired. Request for modification or amendment shall not constitute notice of termination of this agreement."

7. That the Commission on September 11, 1974, issued its declaratory ruling in the above noted matter, 1/ wherein it found, inter alia, that certain matters were or were not mandatory subjects of bargaining.

8. That in the Spring of 1975, the District tendered individual teaching contracts to teachers for the 1975-1976 school year, which provided, inter alia, that:

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

"This contract is specifically made subject to and will be amended and modified to comply with the terms and provisions of any applicable bargaining agreement between the Board of Education and the Oak Creek Education Association entered into subsequent to the tender of this contract to the teacher."

and that said contracts also provided:

"It is further agreed that the teacher employed under the terms of this contract is subject to the rules and regulations duly adopted by the Board of Education of said district."

9. That the parties in the Spring of 1975 entered into collective bargaining negotiations for a successor contract; that both parties served notice to modify the contract and neither party attempted to terminate the contract; that the Association then presented a number of bargaining proposals; that many of those proposals involved matters which the Commission had found in the above noted declaratory ruling to be non-mandatory subjects of bargaining; that, for example, the Association proposed that Article XXI, entitled "Teaching Conditions", be modified as follows:

"Sections 21.1, 21.2, 21.3 - Replace with the following language on class size?

'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 appropraite [sic] 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 should include consideration of possible class sizes best suited to the course of 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 (specific skill problems) sections	6
All 'remedial' (low ability) sections	15

All special education enrollments per instructor*

	Maximum Size
EMR - Primary	12
EMR - Junior High	12
ED	10
LD - Self Contained	10
LD - Resource Room	12

*Additions beyond maximum only by approval of multidisciplinary team (Director of Soecial [sic] Education, social worker, all special education teachers) or as otherwise prescribed by state statutes.

B. Elementary

	Desirable Size	Maximum Size
Kindergarten	18	25
1-6 Academic Classes	24	27
K-6 Music, Art	24	27
K-6 Physical Education	28	30

C. Junior High

7-9 Academic Classes	24	27
7-9 Laboratory/Shop	DEPENDS ON FACILITY, BUT NOT TO EXCEED ACADEMIC MAXIMUM	
7-9 General Music	24	27
7-9 Physical Education	28	30

D. High School

10-12 Academic Classes	26	29
10-12 Laboratory/Shop	DEPENDS ON FACILITY, BUT NOT TO EXCEED ACADEMIC MAXIMUM	
10-12 Advanced Seminars		20
10-12 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 last 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 concurrent with consent of instructor.'

10. 'All desirable and maximum class size figures shall be reduced at the rate of 2 students for every 1 student with special educational needs who has been 'mainstreamed' into a regular class'.

Section 21.5 - Make a separate article on 'Contact Time'. and write as follows:

1. Contact minutes shall be defined as the time assigned for the instruction or supervision of one (1) or more students. There shall be an average of 300 contact minutes for each day. In addition, the total number of contact minutes for a five (5) day week shall not exceed 1500 contact minutes. The maximum number of contact minutes shall not exceed 315 contact minutes on any day.' In any school of this District where the schedule provides for passing time between classes, the time between any consecutive instructional and/or supervisory assignments shall be counted as contact time.'

2. 'Any teacher in grades 7-12 who is assigned more than three class preparations may, at his or her option, decline some or all homeroom, study hall, or other non-class assignments for the duration of any such semester. A class preparation is defined to include such things as 7th and 8th grade math as two different preparations. Different ability levels within a class also call for different preparations.' No teacher in grades K-6 shall have more than three different preparations per day.

3. 'The teacher assignment in grades 7-12 shall consist of homeroom duty, one period of study hall supervision or tutorial duty, five classes, and one preparation period. Where enrollments are small, six classes may be assigned with the consent of the teacher. Tutorial assignments are made for the purpose of providing students with individual help and small group help in the teacher's curricular specialty(ies). Such assignments shall not require preparation or record keeping of any kind by the teacher involved. Where study hall supervision is assigned such supervision will take place in the teacher's regular classroom.'

   Every effort is to be made to distribute assignments as equitably as possible.

   No study hall shall exceed a sustained 30-1 ratio.'

4. 'Every teacher shall have a minumum of sixty (60) minutes for preparation each day on a typical student day (K-12). Team teachers, closed circuit television teachers, and other such teachers shall be alloted in addition to the above mentioned minimal sixty (60) minute preparation period forty-five (45) consecutive minutes per day for whole instructional team conferences and/or preparation. All preparation time shall be in segments of not less than twenty (20) consecutive minutes.'

5. 'The normal school day shall be seven hours for teachers in grades K-6 and seven and one-half hours for teachers in grades 7-12. This time shall be exclusive of a 30 continuous minute duty free lunch period.'

Section 21.7 - Add - 'All Curriculum work shall be credited toward in service credits at the rate of 1 in-service credit for every nine hours of curriculum work.'

Section 21.8 - No Change

Section 21.9 - Delete

Section 21.10 - No Change

Section 21.11 - Delete"

10. That the Association proposed in Article XXVII, entitled "Clerical Aides",that:

"Replace with the following: The Board shall provide the services of one full-time (employed) aide for every six teachers. All aides shall have typing skills."

11. That the Association proposed the following language under Article XXIX, entitled "Cirrculum Council":

"Elections within first four weeks of school. Delete reference to the specific functions of the Curriculum Council. Add the following:

'The District shall publish monthly and distribute to all teachers a description of the activities and plans of the Curriculum Council. The purpose of the publication shall be both informational and to stimulate interest among the staff in cirriculum related matters."

12. That the Association also proposed that the language pertaining to department chairman contained in Article XVII, Section 17.6, of the then existing contract be retained.

13. That the Association proposed a new Article entitled "Teacher In-Service" which read in part:

> "The In-Service Committee shall be made up of three teachers appointed by the OCEA and three administrators. Teachers will be representative of all grade levels and selected from volunteers by the Oak Creek Education Association. Administrators will be assigned by the Superintendent. The appointers will specify the terms of service. Replacement of committee members for various reasons will be accomplished as soon as possible. Newly appointed members will complete the unfulfilled terms. Teacher representatives shall be granted three in-service credits for each year of service on the In-Service Committee. In addition, teacher representatives shall be released from normal teaching duties, when necessary, to carry out their responsibilities with the Committee.
>
> Terms of Service
>
> Initially the six appointments will be for various terms, i.e., two members for one year, two members for two years and two members for three years. Two new appointments will be made annually. This rotating membership should help to assure consistency and continuity.
>
> Chairman: The Committee will elect its own chairman annually.
>
> Responsibilities: The Committee will organize to perform two primary tasks.
>
> 1. Receive and evaluate requests from individual professional staff members to receive salary schedule credit for participation in educational programs which have been organized and offered by agencies other than colleges or universities.
>
>   Each such request will be filed on a REQUEST FOR SALARY SCHEDULE CREDIT form. (Criteria for evaluation of such requests are set forth in the GUIDELINES FOR GRANTING IN SERVICE CREDIT.)
>
> 2. Organize in-district educational programs to meet local professional staff member needs and interests. This to be done following appropriate surveys and receipt of suggestions from other sources. These programs will be carried out after the school day, evenings, Saturdays. (See the GUIDELINES FOR GRANTING IN-SERVICE CREDIT)."

14. That the District by letter dated May 15, 1975, also proposed certain modifications of the contract; that in a separate letter dated May 15, 1975, the District, via its Attorney, Mark Vetter, advised the Association in essence that it would not bargain over certain areas which the Commission had found to constitute non-mandatory subjects of bargaining; and that Vetter's letter provided in material part that:

> "The purpose of this letter is to inform you and the members of the Oak Creek Education Association bargaining committee, that it is the position of the Board of Education, Oak Creek - Franklin School District #1 that the following items contained in the

current collective bargaining agreement and the proposals for negotiation submitted to the Board of Education by the Oak Creek Education Association are non-mandatory subjects of bargaining.

1. Article XXI - TEACHING CONDITIONS: Sections 21.1, 21.2, 21.3, 21.6, and 21.7 in the current collective bargaining agreement and the Association's proposals regarding these articles deal with topics which are non-mandatory subjects of bargaining. These topics include: class sizes, contact minutes, preparation periods, and curriculum development. These matters directly relate to the Board's determination of how quality education may be maintained. However, since the Board's decision regarding these matters may have a direct effect upon the teachers' working conditions, the impact of the decisions upon the wages, hours and working conditions of the teachers will be bargained with the Association.

2. Article XXVII - CLERICAL AIDES: The hiring of clerical aides relates to the Board's management functions. However, the question whether teachers should perform clerical duties is a mandatory subject of bargaining since it constitutes a portion of the teacher's work load.

3. Article XXIX - CURRICULUM COUNCIL: Curriculum studies and planning concerns itself with basic educational policy and is therefore left to the discretion of the Board. However, teacher participation in curriculum development and the impact this has upon their hours and conditions of employment is a mandatory subject of bargaining.

4. New Article - TEACHER IN-SERVICE: (Pages 15-16 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 on teachers' working conditions. However, the Board will bargain the requirements for participation of employees in the in-service program and the credits earned for participation therein since these matters directly affect the teachers' hours and conditions of employment.

5. New Article - DEPARTMENT CHAIRMEN: (Pages 19-19a of the Association's proposals). The Board has the unilateral right to establish or not establish any department chairman positions. However, the Board will bargain with respect to promotions to such positions, as well as the wages, hours and working conditions of those employees holding such positions as long as they are included in the bargaining unit.

6. New Article - TEACHER EVALUATION: (Pages 19b-20 of the Association's proposals). The selection of staff evaluators referred to in the Association's proposal is a non-mandatory subject since it does not relate directly to the teacher's ability to perform as required by the employer. These selections reflect efforts to determine management techniques rather than conditions of employment of the teachers.

. . .

It is the Board's position that the proposals of the Oak Creek 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. There may

be other items incorporated in the Association's proposals which, upon further explanation, may also be determined to be non-mandatory subjects of bargaining. We will identify those areas to the representatives of the Association if and when they should arise at the bargaining table.

In view of the fact that these items are non-mandatory subjects of bargaining, the Board of Education respectfully declines to negotiate on these proposals or any reference to these topics in the present agreement. However, the Board is interested in hearing the teachers' concerns regarding these items and would like to meet with the representatives of the Association to discuss them. The Board will then inform the Association of its decisions in these areas 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 Oak Creek Educational Association.

15. That the parties thereafter engaged in collective bargaining negotiations; that the District there bargained on all mandatory subjects of bargaining; that while the District refused to bargain on any non-mandatory subjects of bargaining, it did offer to bargain over the impact or effects of decisions regarding said subjects and it did listen to said proposals when they were presented by the Association; and that the District there maintained that the non-mandatory subjects of bargaining already contained in the 1973-1975 contract would automatically disappear from the contract, absent the mutual agreement of the parties to maintain them in a successor contract.

16. In July and August, 1975, the District unilaterally adopted certain policies relating to class size, teacher work day, curriculum council, clerical aides, area chairpersons and discipline; that the Association discussed those policies with the District both before and after they were adopted; and that the District subsequently implemented some of those policies during the 1975-1976 school year. 2/

17. That as of the instant hearing, the District has refused to bargain over the non-mandatory subjects of bargaining noted in paragraph 14, supra, but at the same time, it has been willing to bargain over the impact and effects of such subjects.

18. That as of the instant hearing, the parties have not reached agreement on a new or modified collective bargaining agreement.

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

CONCLUSION OF LAW

That Respondent has not violated Section 111.70(3)(a)1 or 4, nor any other section of MERA, by refusing to bargain over the non-mandatory subjects of bargaining in issue and by unilaterally implementing certain policies relating to said subjects.

2/ Following the close of the hearing and after the receipt of briefs, the Examiner by letter dated August 2, 1976 requested the parties to advise whether the District had implemented any of the above noted policies. The parties thereafter executed a joint stipulation to the effect that some of those policies had been implemented.

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

ORDER

IT IS ORDERED that the complaint filed in this matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 10th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant alleges that the District in 1975 unlawfully refused to bargain over certain items proposed by the Complainant in collective bargaining negotiations, items which are set forth in paragraphs 9, 10, 11, 12, and 13 of the above Findings of Fact. In this connection, Complainant acknowledges that all of the items in dispute - covering class size, contact minutes, preparation periods, curriculum development, clerical aides, curriculum council, teacher in-service, department chairman, etc.-have been held by the Commission to constitute non-mandatory subjects of bargaining. Furthermore, the Complainant concedes that the District has met and conferred over these items, and that the District has been willing to bargain over the impact of these decisions in these areas. However, the Complainant argues that the District is nonetheless also required to bargain over the above enumerated areas primarily because: (1) the District has waived its right to refuse to bargain over these areas by virtue of the fact that the parties have bargained over them in the past; (2) the individual teaching contracts tendered to teachers in the Spring of 1975 indicated that the teachers would continue to work under their past working conditions; and (3) the 1973-1975 master contract incorporating such provisions continued in full force and effect because the District did not properly modify such contractual provisions in the 1975 negotiations for a successor contract.

The District, on the other hand, points out that all of the Complainant's above noted proposals constitute non-mandatory subjects of bargaining under the Commission's Oak Creek 3/ and Beloit 4/ declaratory rulings and that, as a result, it is not required to bargain over said subjects. The District argues in its brief that Complainant is "attempting to subvert and bypass" those Commission decisions and that if the Complainant's position were to be sustained, that would "render meaningless the efforts which the (District) exhibited in pursuing the Declaratory Ruling as a peaceful means of resolving the status of bargaining subjects."

Turning to the merits of the issues presented, it is undisputed that the Association's proposals relating to class size, contact minutes, preparation periods, curriculum development, clerical aides, curriculum council, teacher in-service and department chairmen all constitute non-mandatory subjects of bargaining under Oak Creek, supra and City of Beloit, supra. Accordingly, the District under those decisions was only required to meet and confer on such subjects and to bargain over the impact and effect of decisions it made in those areas. Here, there is no claim that the District has failed to fulfill that duty. The Association's case, therefore, rests entirely on the theory that the District is required to bargain over these areas by virtue of the particular facts herein, facts which allegedly show that the District failed to properly modify the 1973-1975 contract, that individual teaching contracts for the 1975-1976 school year incorporated past conditions of employment, and that the District has waived its right to object to bargaining over these proposals by virtue of past bargaining history.

3/ Oak Creek, supra.

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

As to the modification issue, the contract provides, as noted in paragraph six of the Findings of Fact, that either party can modify or amend the contract by giving written notice to that effect, with said notice specifying "the nature and extent of the modification or amendement desired." Here, following the Association's proposals, the District, via Attorney Vetter's May 15, 1975 letter, specifically advised Complainant that the proposals in issue were non-mandatory subjects of bargaining and that, as a result, the District "respectively declines to negotiate on these topics in the present agreement". Since such written specification was given to the Association within the contractually designated period, and as such notification obviously evidenced the District's desire to modify the contract by deleting all contractual references to these proposals, there is no question but that the Association was advised of the fact. 5/

Similarly unfounded is the Association's assertion that the District was required to bargain over these proposals by virtue of the 1975-76 individual teaching contracts. As to this theory, the Association claims in essence that the 1975-76 individual contracts provided that they were subject to the terms of the master contract, that the 1973-1975 master contract contained provisions relating to many of the items in dispute, and that, therefore, the teachers who signed their individual contracts did so with the expectation that such provisions would be changed only if their representatives agreed to do so.

Inasmuch as the Commission's rulings in Oak Creek, supra, and Beloit, supra were issued, and affirmed by the circuit court, well before the teachers signed their individual contracts, and since the Commission there held that the areas herein were non-mandatory subjects of bargaining, it is highly questionable as to whether such teachers could reasonably have assumed that the matters herein would be subject to the bargaining process or that they would be in effect for the forthcoming school year. Moreover, it is immaterial what the teachers may have expected, as the issue of whether the District must bargain over the issues in dispute is totally independent of the subjective feelings of the teachers. Additionally, it must be noted that the individual teaching contracts do not provide that the teachers would necessarily enjoy all of the same conditions which they enjoyed in the past. Instead, they provide only that they will be subject to the terms of the master contract. Additionally, those individual contracts expressly recognize that the District can unilaterally establish certain policies by providing that teachers are "subject to the rules and regulations duly adopted by the (District)." Here, since the District has exercised its lawful prerogative of refusing to bargain over these areas, there is no basis for finding that the individual teaching contracts imposed on the District a duty to either maintain the proposals herein in a successor contract or to bargain over those proposals in the negotiations leading up to that contract.

Left is the Association's claim that the bargaining history of the parties establishes that the District has waived its right to refuse to bargain over the proposals in issue. In this connection, the Association asserts that since the District bargained over these matters in 1973, it must bargain about them now, and that if the District bargains about them now, it must bargain about them in the next contract, 6/ and apparently so on, ad infinitum. As to the 1973 memorandum, the Association ventures in its brief that that language "must be construed to apply only to (the

---

5/ Inasmuch as the District's letter was so unequivocally clear, it is immaterial that the District did not use the precise words "modify" or "amend" to evidence its intention in this matter, as such intent was manifestly made.

6/ Transcript p. 44.

declaratory ruling) and not beyond it" and that, therefore, "there is no basis for claiming that the parties intended this memorandum of agreement to immunize them from all implications of their bargaining and of their agreement to insert such subjects in [sic] collective bargaining contract."

As noted above, the 1973 memorandum provides:

> "The undersigned parties hereby agree that any matters bargained and/or agreed to in no way constitute a waiver of their respective positions as to the Oak Creek-Franklin declaratory ruling pending before the Wisconsin Employment Relations Commission."

By virtue of its foregoing claim, the Association claims in essence that the 1973 memorandum should be construed to read as follows:

> "Despite the fact that the District has initially refused to bargain over subjects which it believes to be non-mandatory subjects of bargaining, and which are now the subject of a petition for a declaratory ruling which the District has iniated, the District hereby agrees to bargain over said subjects, pursuant to the Association's demand, and agrees that such bargaining constitutes a permanent waiver of its right to refuse to bargain over such subjects in the future, irrespective of whether the Commission decides that they are non-mandatory subjects of bargaining. However, despite this permanent waiver for collective bargaining purposes, it is further agreed that the District can continue to expend its considerable time and resources to determine the abstract legal question of whether other school districts in the State of Wisconsin are required to bargain over the subjects in dispute. While the District is willing to expend such time and resources as a public service to its fellow school districts, it agrees that the results of that proceeding will have no effect whatsoever on the parties herein, now and forever more."

Since it is inherently implausible that the District would ever agree to such a result, and inasmuch as the Association's proffered interpretation is in total variance with the language actually used in the memorandum, the Association's claim must be rejected.

Much more reasonable is the interpretation advanced by the District. It maintains that the memorandum was "agreed upon as a means of temporarily resolving the major differences which existed between the parties at that time", that the memorandum was used as a "catalyst toward achieving a collective bargaining agreement, while still allowing the parties to retain the basic rights which they possessed," that once the declaratory ruling issued, "the rights of the parties reverted to what they were as of September 5, 1973,", that as of that date the District had refused to bargain over the issues at hand, and that, therefore, the District had never waived its right to refuse to bargain over those issues. Under that interpretation, the memorandum is to be read as:

> "The parties herein have a fundamental difference of opinion over whether certain subjects are bargainable. That difference in large part has precluded the finalization of a collective bargaining agreement. So as to reach agreement on a final contract, the parties hereby agree that bargaining over said disputed subjects will not prejudice the future rights of the parties, once these rights have been resolved in the pending declaratory ruling. Thus, if the Association's view prevails in that proceeding, the contractual provisions herein relating to the disputed subjects shall remain in effect for the contract's duration. On the other hand, if the District prevails in that

proceeding, the contractual provisions here agreed to shall not be binding for the remainder of the contract's duration, as the District has not waived its right to refuse to bargain over those subjects."

In light of the background herein,which establishes that the District initially refused to bargain over non-mandatory subjects in 1973, that it finally did so only after the parties agreed that such bargaining would not constitute a waiver, and that the parties thereafter pursued their respective positions in the declaratory ruling, there is no question but that the District's interpretation of the 1973 memorandum is much more meaningful than the one advanced by the Association. For, since the dispute between the parties over bargainability in 1973 was then being resolved through the mechanism of a declaratory ruling, it is of course not surprising that the memorandum refers to that specific proceeding, as it was that proceeding which would determine the legal rights of the parties. In such circumstances, and because any other interpretation would lead to the absurd construction advanced by the Association, it must be concluded that the 1973 memorandum was not meant to be limited to only the declaratory ruling, but rather, to any other related proceedings which involve the question of whether the District is required to bargain over the disputed items. As this is one such proceeding, the 1973 memorandum is therefore applicable to the instant issues.

As the language therein provides that the 1973 bargaining between the parties would not be construed as a waiver of their respective positions, it follows that the District did not then waive its right to refuse to bargain over those subjects in the future. Accordingly, there is no merit to the Association's claim that the District was precluded from refusing to bargain over the Association's 1975 non-mandatory bargaining proposals by virtue of the 1973 negotiations between the parties.

By the same token, the District was free to unilaterally adopt and implement policies relating to such non-mandatory subjects of bargaining during the 1975-1976 school year, after the District had earlier notified the Association that it wished to modify the 1973-1975 contract by deleting all references therein to those subjects. 7/ Thus, in light of the 1973 memorandum, there is no basis for finding that the provisions then agreed to constituted a contractual waiver of the District's right (subsequently determined) to refuse to bargain over those subjects. To the contrary, it seems clear that those items were inserted into the 1973-1975 contract only because the parties then understood that the District would no longer be bound by those provisions if the District's position prevailed in the then pending declaratory ruling. Since

---

7/ While this issue was not expressly framed in the complaint, it was litigated by the parties. Accordingly, the Examiner by letter dated August 2, 1976 advised the parties of this fact and there stated that "it appears that (the parties) want a determination made as to whether (the District) is legally required to continue to adhere to the disputed items of the 1973-1975 contract." Thereafter, by letter dated August 6, 1976, the Association called the Examiner's attention to a various authority to support its position. Inasmuch as neither party has objected to a resolution of this issue, and as both issues herein arise out of the same factual background and both involve application of the 1973 memorandum, this issue is being resolved herein.

the Commission, with court approval, subsequently held that many of those items did not constitute mandatory subjects of bargaining, the District was therefore free to ignore those contractual provisions which had been agreed to on the premise that they might constitute mandatory subjects of bargaining.

Accordingly, based upon the foregoing considerations, the complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 10th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner