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-B

ORDER REVISING EXAMINER'S FINDINGS OF FACT AND REVERSING CONCLUSION OF LAW AND ORDER

Examiner Amedeo Greco having, on September 10, 1976, issued Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum, in the above-entitled matter, wherein he concluded that the above-named Respondent did not commit any prohibited practice within the meaning of any provision of the Municipal Employment Relations Act by refusing to bargain over certain non-mandatory subjects of bargaining and by unilaterally implementing certain policies relating to said certain non-mandatory subjects of bargaining; and the above-named Complainant having timely filed a petition for review pursuant to Section 111.07(5) of the Wisconsin Statutes, as well as a brief in support thereof; and the above-named Respondent having responded to said petition for review by a letter supporting the Examiner's decision in its entirety; and the Commission having reviewed the Examiner's decision, the entire record, and the briefs and arguments of the parties, and being satisfied that the Examiner's Findings of Fact be revised, in part, and that his Conclusion of Law and Order be reversed;

NOW, THEREFORE, it is

ORDERED

1. That the Examiner's Findings of Fact be revised as follows:

(a) The Commission affirms all of the Findings of Fact as made by the Examiner in the above-entitled matter, with the exception of the following:

(b) Paragraph 6 of the Examiner's Findings of Fact is revised to read as follows:

6. That Article XXV of said contract, entitled "Duration of Agreement," provided, in full, as follows:

"Section 25.1. This agreement supercedes all previous agreements between the parties and shall be binding upon the Board and the Association and all employees over whom the Association has jurisdiction as a collective bargaining agent and

shall be in full force and effect on all parties until modified, effective August 15, 1973, through August 14, 1975, and thereafter from year to year unless mutually changed by the parties hereto or terminated at the end of any such year in the manner hereinafter provided.

Section 25.2. Either party may terminate this agreement at the end of its initial term or upon any succeeding anniversaries thereof by delivering in writing a notice of such termination to the other party not less than sixty (60) days prior to the end of any such contract period.

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."

(c) The introductory language appearing in Paragraph 9 of the Examiner's Findings of Fact is revised to read as follows:

9. That, after both parties had served each other with timely notices of a desire to modify their existing collective bargaining agreement, rather than notices to terminate same, the parties in the spring of 1975 entered into collective bargaining; that the Association presented a number of proposals, many of which 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:

2. That the Examiner's Conclusion of Law be reversed so that the Conclusion of Law now reads as follows:

That, since neither party terminated the 1973-1975 collective bargaining agreement, the Respondent, Board of Education, Oak Creek-Franklin School District No. 1, by refusing to bargain collectively with the Complainant, Oak Creek Education Association, with respect to those provisions in the collective bargaining agreement existing between said parties relating to permissive subjects of bargaining in order to obtain a mutual agreement to delete said provisions from said existing collective bargaining agreement, and by unilaterally implementing policies relating to certain said permissive subjects of bargaining, which policies were set forth in certain provisions of an existing collective bargaining agreement committed prohibited practices within the meaning of Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

3. It is also ordered that the Examiner's Order be reversed so that the Order now reads as follows:

IT IS ORDERED that the Respondent, Board of Education, Oak Creek-Franklin School District No. 1, its officers and agents, immediately:

1. Cease and desist from:

   (a) Refusing to bargain collectively with Complainant, Oak Creek Education Association, when seeking to delete or modify proposals, in an existing collective bargaining agreement, relating to permissive subjects of bargaining, where said collective bargaining agreement requires mutual consent to delete or modify such provisions.

   (b) Unilaterally implementing policies relating to permissive subjects of bargaining, where provisions relating to the subject matter of such policies are set forth in an existing collective bargaining agreement, where said agreement requires mutual consent to delete or modify any provisions thereof.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

   (a) Provided that neither said Respondent nor Complainant have terminated the 1973-1975 collective bargaining agreement or any modification thereof embodied in a modified agreement, reinstate the provisions in the 1973-1975 collective bargaining agreement between the Respondent and Complainant relating to class size, teacher work day, curriculum counselor, clerical aides, area chairperson and discipline.

   (b) During the term of an existing collective bargaining agreement with the Complainant, where said collective bargaining agreement requires mutual consent to delete or modify any of its proposals, bargain collectively in good faith with the Complainant at such time as is permitted in said collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER'S FINDINGS OF FACT AND REVERSING CONCLUSION OF LAW AND ORDER

The Examiner's Findings of Fact:

The Examiner's Findings of Fact can be generalized as follows: In 1973 the parties were engaged in collective bargaining over wages, hours and conditions of employment covering teachers in the employ of the District, to be included in a collective bargaining agreement to become effective August 15, 1973. During said negotiations issues arose as to whether certain proposals submitted by the Association were or were not mandatory subjects of bargaining, and as a result, the District, on April 20, 1973, filed a petition for a declaratory ruling with the Commission, requesting a determination as to whether various matters proposed in bargaining by the Association were or were not mandatory subjects of bargaining. Prior to September 5, 1973, and while the declaratory ruling was pending before the Commission, the District refused to bargain collectively on the matters involved in the declaratory ruling proceeding. However, on September 5, 1973, the parties executed the following "Memorandum of Agreement":

> "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."

Following the execution of the above document, the District bargained on matters which were subject to the declaratory ruling proceeding, and thereafter the parties executed a collective bargaining agreement, effective from August 15, 1973, through at least August 14, 1975. Said document contained provisions, mutually agreed upon, which were involved in the declaratory ruling proceeding. The Examiner also set forth in his Findings of Fact a portion of Article XXV entitled "Duration of Agreement" as follows:

> "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."

On September 24, 1974, the Commission issued its declaratory ruling and therein found, among other things, that certain matters were not mandatory subjects of bargaining. In the spring of 1975, the District tendered individual teaching contracts for the school year 1975-1976, which contained, in part, the following provisions:

> ". . . this contract is specifically made subject to and will be amended and modified to comply with the terms and provisions of any applicable collective 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.
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> . . .

"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."

Prior to engaging in collective bargaining in the spring of 1975 both parties served notice to modify the contract and neither party attempted to terminate the contract. 1/

During the 1975 negotiations the Association presented a number of proposals, including modifications pertaining to provisions in the then existing collective bargaining agreement, which the Commission had determined were non-mandatory subjects of bargaining. During said negotiations the District also proposed certain modifications of the existing collective bargaining agreement, pertaining to the non-mandatory subjects of bargaining and indicated that it would not bargain with respect to those matters which the Commission had found to be non-mandatory subjects of bargaining. The District also indicated that it declined "any reference to these topics in the present agreement." Further, the District, during bargaining, maintained that the non-mandatory subjects of bargaining contained in the 1973-1975 agreement would automatically disappear from said agreement, absent mutual agreement to maintain same therein.

In July and August 1975 the District unilaterally adopted policies relating to certain non-mandatory subjects of bargaining, which were set forth in the collective bargaining agreement executed on August 15, 1973. The individual teaching contracts were, as a result, affected by said changes in the District's policies.

The Examiner also found that, while the District refused to bargain on said non-mandatory subjects, it was willing to bargain over the impact and effects thereof, and, further, that as of the date of the hearing before the Examiner, the parties had not reached an agreement on a "new or modified collective bargaining agreement."

The Examiner's Conclusion of Law:

The Examiner concluded that the District, by refusing to bargain over the non-mandatory subjects of bargaining and by unilaterally implementing certain policies relating to said subjects, did not violate Sections 111.70(3)(a)1 or 4 of the Municipal Employment Relations Act, and, therefore, the Examiner dismissed the complaint.

The Examiner's Rationale:

In his Memorandum accompanying his Findings of Fact, Conclusion of Law and Order the Examiner set forth the positions of the parties as follows:

"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

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1/ Paragraph 9 of the Examiner's Findings of Fact.

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 2/ and Beloit 3/ 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."

The Examiner set forth that as early as May 15, 1975, by timely notice, the District indicated a desire to modify the existing collective bargaining agreement by "deleting all contractual references to the non-mandatory subjects of bargaining." The Association argued that the District was required to bargain over such matters by virtue

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2/ Oak Creek-Franklin Joint City School District, 11827-D (9/74), Aff'd. Dane Co. Cir. Ct., 144-473, (5/75).

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

of the 1975-1976 individual teacher contract, which provided that they were subject to the terms of the master contract on the ground that the teacher sign said individual contracts with the "expectation that such provisions would be changed only if the Association agreed to do so." The Examiner rejected said argument, stating that it was immaterial what the teachers may have expected inasmuch as the issue of bargainability was independent of the subjective feelings of the teachers. On this issue the Examiner concluded as follows:

> "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."

The Examiner then considered the position of the parties regarding past bargaining history, as well as the September 5, 1973 memorandum. The Examiner characterized the Association's position on past bargaining history as follows:

> "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, 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 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.'"

With respect to the District's position on said issue the Examiner quotes the following portion of the District's brief:

> "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."

The Examiner rejected the Association's argument that the District waived its right to refuse to bargain with respect to the non-mandatory subjects of bargaining as a result of bargaining history between the parties. The Examiner interpreted the September 5, 1973 memorandum, and his rationale therefor, as follows:

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

Association's Petition for Review:

In its petition for review the Association contended that the Examiner omitted certain material findings of fact and made an erroneous conclusion of law. Said significant contentions were set forth in the petition for review as follows:

> "a) No Finding of Fact was made regarding the clear contractual requirement that the existing collective bargaining contract could only be modified by mutual agreement, in contrast to the parties' individual right to each terminate said contract. (Ex. 2, Article XXV, Sec. 25.1 & 25.2).
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> b) No Finding of Fact was made that the Respondent failed to timely notify the Complainant of its desire to modify the disputed collective bargaining terms. Such modification would require mutual bargaining and agreement, according to the contractual language itself.

c) The Examiner's Accompanying Memorandum misstates Complainant's position, in that Complainant does not assert that the Respondent has a perpetual obligation to bargain 'non-mandatory' subjects once it has previously bargained them into a collective bargaining contract. Rather, Complainant believes that any changes in such terms, including their removal from the collective bargaining contract, must be made only as the result of collective bargaining at that time. Complainant believes this position is entirely consistent and is in fact required by the specific language of the collective bargaining contract itself, as well as the language of the 1973 Memorandum of Agreement entered into between the parties.

d) Similarly, Complainant recognizes that the individual teaching contracts entered into between the teachers and the Respondent incorporate the full terms of the master collective bargaining contract, and such terms may be changed. However, individual teachers as parties to such contracts have a right to be part of such contractual changes, as in the case of collective bargaining and ratification by members of the Complainant Association. The Respondent's unilateral withdrawal of important guarantees regarding teaching conditions violates this principle.

e) In addition, the Complainant hereby incorporates all other assertions of Fact and Law contained in its accompanying Brief, which are inconsistent with the Examiner's Findings of Fact, Conclusions of Law, and Order in this matter."

The Association accompanied its petition with a brief in support thereof. Said brief was an identical copy of the brief which the Association had filed with the Examiner. The District responded to the petition for review by a letter supporting the Examiner's decision in its entirety.

Discussion:

We agree with the Association that, while including a portion of Article XXV, the "Duration of Agreement" provision, relating to the desire of either party to "modify or amend" the 1973-1975 collective bargaining agreement, the Examiner did not include that portion of the Article relating to the right of either party to "terminate" said agreement. We deem the entire Article to be material, and, therefore, we have revised Paragraph 6 of the Findings of Fact so as to have set forth said entire Article.

With respect to the Association's contention that the Examiner did not make a finding that the District failed to timely notify the Association of the District's intent to modify the collective bargaining agreement, it is to be noted that in his Memorandum the Examiner set forth that the May 15, 1975 letter from the Association "was given to the Association within the contractually designated period." Nevertheless, we have revised Paragraph 9 of the Findings of Fact to reflect that said letter, indicating a desire to modify the existing collective bargaining agreement with respect to certain specified matters, did constitute a timely notice to modify the agreement, as contemplated in Article XXV of the collective bargaining agreement.

We disagree with the Association's contention that the Examiner, in his Memorandum, misstated the Association's assertion that the District had a perpetual obligation to bargain "non-mandatory subjects of bargaining" once it had bargained thereon and incorporated subject matters thereof in a collective bargaining agreement. A review of the brief filed by the Association with the Examiner supports the Examiner's characterization of the Association's position in this regard. We quote the following portions of the Association's brief to the Examiner:

> ". . . the special considerations in the public sector which made these obvious 'conditions of employment' to be 'permissive' rather than mandatory, as they would be in the private sector, cannot negate the fact that once bargained, they are an integral part of the employment common law. This is all the more true where, as here, they were bargained against purely mandatory subjects. This is not to say these terms can never be dropped from an agreement rather their fate must be bargained, including their possible deletion. This is merely consistent with past practice of bargaining their inclusion and their language."

Further, the Association, on pages 37 and 38 of its brief, contended as follows:

> "Once terms of employment which had become a part of the work-place tradition are allowed to be unilaterally withdrawn, the result is simply that, even if it does not also run afoul of the collective agreement and the individual teaching contracts, as it does here. The result of allowing such an inequity is not merely to foster an unjust situation upon public employees; it is to encourage them in the strongest terms possible to breach that statute and to seek the only remedy they see available: that is to withhold their labor in collective fashion. Such collective resort to 'self-help' in the public sector employment relationship will only be encouraged by laxity regarding maintenance of the status quo, whether under a continuing contract and duration clause (as here) or during negotiations for successors to an expired contract." 4/

We agree with the Examiner that the fact that a municipal employer has once engaged in bargaining on a permissive subject of bargaining and included the subject matter involved in the collective bargaining agreement, in itself, does not require said municipal employer to bargain on said matter in future collective bargaining. However, such a "non-duty" may be subject to other factors, such as waivers or the terms of the collective bargaining agreement containing the provisions relating to permissive subjects of bargaining.

In examining the waiver agreement executed by the parties on September 5, 1975, it is apparent that the plain intent thereof indicated that the parties, by bargaining on permissive subjects of bargaining, did not waive their positions in the declaratory ruling proceeding with respect to those non-mandatory subjects of bargaining. Nothing in the September 5 waiver agreement can be inferred that such a waiver could be applied to any provisions in the 1973-1975 collective bargaining agreement then being negotiated. The latter collective

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4/ Emphasis added.

bargaining agreement contains no reference to the September 5 waiver agreement, nor does it contain any specific language as to the elimination of the provisions relating to permissive subjects of bargaining during the term of said agreement. Therefore, we conclude that from August 15, 1973, through August 14, 1975, the District could not have unilaterally changed or deleted any provision in said agreement, including those relating to permissive subjects of bargaining.

Article XXV, the "Duration of Agreement" provision, is material to the disposition of the issue in this matter. Under Section 25.2 of Article XXV, had the District given the Association timely notice to terminate the 1973-1975 collective bargaining agreement, the District would have had no legal duty to bargain on permissive subjects of bargaining in negotiating a new agreement, despite the fact that the provisions relating thereto were contained in the existing collective bargaining agreement. However, neither party served any notice to terminate the agreement. Rather, the notices served by both were indications of an intent to modify the 1973-1975 agreement. A notice to modify does not constitute a notice to terminate. 5/ In compliance with Section 25.1 of Article XXV, no provision in the existing agreement could be changed unless there was a mutual agreement to do so. Therefore, absent a notice to terminate, the District, in order to properly delete or change any provisions relating to permissive subjects of bargaining, which were contained in the collective bargaining agreement, could only be done through mutual consent, a process which involves collective bargaining. Absent a mutual agreement to delete or change those provisions relating to permissive subjects of bargaining, such provisions would remain unaltered until such time as the collective bargaining agreement was terminated by proper notice. Thus, we do not agree with the Examiner's rationale to the effect that the District was free to ignore those contractual provisions relating to permissive subjects of bargaining, nor that the District had the right to unilaterally adopt employment policies relating thereto in the 1975-1976 school year, simply for the reason that it was prevented from doing so since the 1973-1975 agreement had not been terminated. 6/ Therefore, we have reversed the Examiner's Conclusion of Law and Order accordingly.

Dated at Madison, Wisconsin, this 29th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

5/ Int'l. Union of Operating Engineers, Local 181 v. Dahlem Construction Co., 193 F. (2d) 470, 12/51.

6/ Had either party given timely notice to terminate the 1973-1975 agreement there would be no statutory or contractual obligation upon the District to maintain the status quo with respect to the permissive subjects of bargaining until an impasse had been reached.