STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

BOARD OF EDUCATION, ASHWAUBENON SCHOOL DISTRICT NO. 1, ASHWAUBENON SCHOOL DISTRICT NO. 1,

Case X
No. 20599 DR(M)-73
Decision No. 14774-A

Requesting a Declaratory Ruling in a Dispute between Said Petitioner and

ASHWAUBENON EDUCATION ASSOCIATION

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

The Board of Education, Ashwaubenon School District No. 1, Ashwaubenon School District No. 1, having on June 18, 1976, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to issue a Declaratory Ruling, pursuant to section 227.06(1), Wisconsin Statutes, with respect to the right of Board of Education, Ashwaubenon School District No. 1, Ashwaubenon School District No. 1 to communicate its salary proposal made to the Ashwaubenon Education Association during the course of collective bargaining directly to the employes represented by the Association, and the parties having filed a stipulation of facts with the Commission on August 6, 1976, thereby waiving hearing in the matter; and the Commission having considered the stipulation, the briefs and arguments filed by the parties, and being fully advised in the premises, issues the following Findings of Fact, Conclusion of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That, Ashwaubenon School District No. 1, herein Petitioner, is a municipal employer within the meaning of section 111.70(1)(a), Wisconsin Statutes, with offices at 1055 Griffiths Lane, Green Bay, Wisconsin.

2. That, the Board of Education, Ashwaubenon School District No. 1, is an agent of the Petitioner and is charged with the possession, care, control and management of the property and affairs of the district.

3. That at all times material herein, D.S. Mac Taggert has occupied the position of Superintendent of the Petitioner, and has been an agent of Petitioner acting on its behalf.

4. That at all times material herein, the Ashwaubenon Education Association, herein Association, is and has been a labor organization within the meaning of section 111.70(1)(j), of the Municipal Employment Relations Act; that the Association is the exclusive bargaining representative for purposes of collective bargaining in a unit consisting of all employes of the Board classified as teachers, excluding administrators, administrative assistants, principals, assistant principals, district directors, district supervisors, district coordinators, social workers, psychologists, education interns, non-instructional personnel, and persons employed on a per diem basis.

5. That at all times material the Petitioner and the Association were parties to a collective bargaining agreement in effect from February 1, 1974, to June 30, 1975, covering the wages, hours and working conditions of the employes in the aforementioned collective bargaining unit; that commencing in March 1975 agents of the Petitioner and the Association commenced negotiations for the purpose of reaching an accord on a successor collective bargaining agreement; that on or about September 11, 1975, and prior to reaching such an accord, the Petitioner distributed to all of the teachers in the bargaining unit a one-page memorandum which set forth the individual impact of the Petitioner's most recent offer on each individual affected thereby in respect to his or her salary and monetary fringe benefits, which offer had been made to the Association's negotiating team on September 8, 1975, as well as his or her salary and monetary fringe items which appeared in the 1974-75 collective bargaining agreement; that a sample copy of one such memorandum reads as follows:

"Please be informed that the impact of the school board's last salary offer of a base of $8,750.00 made to your bargaining committee on you, [sic] personally would be:

	74-75	75-76	
Base	$8,200.00	$8,750.00	
Step & Column	6E	7E	
Salary	$11,152	$12,337	$1,185 = 10.63 Increase
Increment		Included	
Social Security	$ 652	$ 721	
Life Insurance	$ 37	$ 40	
Income Protection Insurance	$ 54	$ 60	
BC/BS	$ 471	$ 630	
Retirement	$ 1,360	$ 1,492	
Total	$13,726	$15,280	
	Increase		
	= $1,554	= 11.32%	

This includes column movements made known to date.

Sincerely,

The School Board
Ashwaubenon School District No. 1";

6. That said memorandum was placed in the teachers' respective mailboxes throughout the entire school district, and that said memorandum compared in a non-coercive manner the salary and fringe benefits that

the teachers received during the 1974-75 school year as contrasted with and compared with the most recent salary offer and its impact which the Petitioner had made to the Association's negotiating team on September 8, 1975.

7. That the aforesaid memorandum was distributed while bargaining between the Association and Petitioner were continuing and prior to reaching final agreement on the terms and conditions to be contained in the successor contract.

8. That after September 11, 1975, there were three additional bargaining sessions between Petitioner and the Association; that on or about October 21, 1975, the membership of the Association met and ratified the terms and conditions to be contained in a new collective bargaining agreement for the 1975-76 school year; and that on or about October 24, 1975, agents of the Association and the Petitioner met and executed a new collective bargaining agreement for the 1975-76 school year.

Based upon the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSION OF LAW

An employer does not violate section 111.70(3)(a)1 or 4, Stats., by communicating in a noncoercive manner to its employes during the course of negotiations with respect to the impact of its bargaining position on individual employes where such bargaining position has been previously submitted to the collective bargaining representative.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission issues the following

DECLARATORY RULING

That the Petitioner, by communicating directly with its employes while negotiations were in progress, wherein it outlined the financial impact of its last wage proposal upon each individual employe, did not commit a prohibited practice within the meaning of section 111.70(3)(a)1 or 4 of the Wisconsin Statutes.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

POSITION OF THE PARTIES:

The District seeks a declaratory ruling from the Commission respecting its right as a municipal employer to communicate with its employes while bargaining is in progress with respect to its wage proposal previously made at the bargaining table to the designated bargaining representative of said employes. The reasons cited for seeking said ruling are:

> "[T]he matter involves a legally protectable interest of the Petitioner; b) a declaratory ruling would eliminate repeated litigation of this matter in the future and would settle this recurring controversy which has arisen during each of the two most recent series of negotiations with the Ashwaubenon Education Association and on other occasions in negotiations with employe organizations throughout the State of Wisconsin; c) there is no reason to believe this matter will not arise during future negotiations and d) a settlement of this matter would clarify the parties' duties and rights in the collective bargaining process and would promote the prompt, peaceful and just resolution of labor disputes."

The Association does not dispute the facts herein, nor does it take issue with the District's assessment of the law as applied to those facts. 1/ However, it opposes the issuance of declaratory ruling for two reasons. First, it contends the Commission is without authority to issue a declaratory ruling where a "case in controversy" is nonexistent; and, second, even if the Commission possesses the authority to issue a declaratory ruling where no "case in controversy" exists, it would be akin to an "advisory opinion", and, therefore, should be avoided.

The District argues that section 227.06, Stats., does not require that a "case in controversy" exist as a prerequisite to the issuance of a declaratory ruling as is the case with declaratory rulings provided for in section 111.70(4)(b), Stats. Further, it argues that its petition is in compliance with the procedural requirements of section 227.06, Stats., and is in all other respects proper; thus, allowing for the issuance of a declaratory ruling at the discretion of the Commission. Lastly, the District claims that the language of 227.06(2)(b) Stats. recognizes the non-adversary nature of the proceeding and contemplates that such a ruling may be binding upon none other than the party herein, as the District requests. 2/

1/ The accuracy of the information contained in the Board's communication to employes is not contested, and, therefore, the commission will treat said document as being an accurate representation of the facts.

2/ The District, in its petition, indicated that the party sought to be bound by the requested ruling was the Association; however, in its brief at page 8, the District claims it only seeks to bind itself by said ruling.

The arguments of the District in support of its contention, that the contents of its communication upon which its petition is founded is protected, will not be reviewed inasmuch as the Association concurs with the Petitioner's position in that regard.

DISCUSSION

The petition was filed pursuant to the provisions of section 227.06, Stats., which provides:

"227.06 Declaratory rulings. (1) Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

"(2) Petitions for declaratory rulings shall conform to the following requirements:

"(a) The petition shall be in writing and its caption shall include the name of the agency and a reference to the nature of the petition.

"(b) The petition shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, the reasons for the requested ruling, and the names and addresses of persons other than the petitioner, if any, upon whom it is sought to make the declaratory ruling binding.

"(c) The petition shall be signed by one or more persons, with each signer's address set forth opposite his name, and shall be verified by at least one of the signers. If a person signs on behalf of a corporation or association, that fact also shall be indicated opposite his name.

"(3) The petition shall be filed with the administrative head of the agency or with a member of the agency's policy board.

"(4) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing. If the agency denies the petition, it shall promptly notify the person who filed the petition of its decision, including a brief statement of the reasons therefor."

While no argument is made herein that the petition is procedurally defective, the Commission concludes it is proper in every respect. However, the threshold issue raised by the Association is whether the Commission should issue a ruling as requested by the District.

Section 227.06(1), Stats., as distinguished from section 111.70(4)(b), 3/ does not explicitly condition the issuance of a declaratory ruling

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3/ Section 111.70(4)(b) provides:

"Failure to bargain. Whenever a dispute arises between a municipal employer and a union of its employes concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling."

upon the existence of a dispute. Indeed, the purpose in seeking declaratory rulings is to obtain a declaration of one's rights to enable a decision on future action rather than precipitate protracted litigation. In Wisconsin Fertilizer Association v. Karns, 39 Wis 2d 95 (1967), the Supreme Court said,

> "Further, sec. 227.06, Stats., does not afford a declaratory ruling as a matter of right. The section states that the agency 'may' issue a declaratory ruling on the petition by an interested party. The word 'may' as used in the context of this section makes it discretionary as to whether the commissioner will issue a declaratory ruling."

Our records reveal that since 1974 at least four prohibited practice complaints have been filed against school districts charging them with a prohibited practice for communication with employes during negotiations. 4/ Two of said complaints involved the parties herein. In every instance, the complaints were dismissed upon the request of complainants. Further, although the Commission has previously spoken to the issue of employers' free speech in the public sector, 5/ the nature of the aforementioned complaints and the instant petition persuade us that further clarification of municipal employer rights concerning communication with its represented employes during the pendency of collective bargaining is needed. Lastly, this is not a hypothetical situation but, rather, involves actual facts and is capable of being resolved. 6/

In Janesville Board of Education, supra, complainants therein contended:

> "that the statements made by Collins [Chairman of the Board's bargaining team] during the course of the interview were coercive in that they contained a threat of reprisal and tended to discredit the JEA as the bargaining representative and were likely to undermine it in such status during the period when the parties were involved in conferences and negotiations on wages, hours and conditions of employment. The remarks of Collins as specifically set forth as being objectionable relate to his expressions that salary increases as requested by the JEA have to be stopped for to do otherwise would 'tie down or burden the education system with unacceptable costs', and that in Collins' opinion the JEA was putting undue pressure on the School Board, and that, in general, the teacher representatives were asking for too much and were making a mistake by exerting their collective power to push and push. The Complainants contend that 'the only reasonable inference that can be drawn from such remarks is that the labor organization, the certificated teachers have chosen to represent them in conferences and negotiations with their municipal employer on questions of wages, hours and conditions of employment is acting irresponsibly and improperly. The conclusion is left that the J.E.A., as well as other affiliates of the W.E.A., are not

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4/ Ashwaubenon Jt. School Dist. No. 1, (12585) 3/74; Minocqua Elementary Jt. School Dist. No. 1, (13964-A) 12/75; Edgerton Jt. School Dist. No. 8, (14279-C) 3/76; Ashwaubenon Jt. School Dist. No. 1, (13987-B) 5/76.

5/ Janesville Board of Education, (8791-A) 3/69.

6/ Mitchell Aero Inc., v. Milwaukee, 42 Wis. 2d 656. (1969).

acting as organizations of professional educators interested in improving the quality of education, but in fact in the exercise of their collective power are exercising undue pressure and are pushing, pushing in the welfare and salary areas and such pressure must be resisted or such demands will burden education with unacceptable costs to its detriment.'"

In reviewing the Board's conduct we said,

"All phases of the collective bargaining relationship in municipal employment concern matters of public importance since the rights and duties established in the statute are of public interest and since the public, as taxpayers, is, in effect, a stockholder in the municipal corporation. The legislature, in enacting Sec. 111.70, restricted certain privileges formerly exercised by agents of municipal employers in their relationships with municipal employes, whether such privileges were in the form of action or statements. Statements made by public officials lose their privilege if they are violative of the provisions of the municipal employer-employe labor relations statute.

. . .

"As to whether Collins' remarks constituted unlawful interference, restraint and coercion of the teachers in the exercise of the rights established in Sec. 111.70, we agree with the Respondents that the remarks in the interview, in the context and at the time when they were made, were not violative of the statute. Collins had the right to discuss the demands of the JEA upon the Board of Education and the probable effect thereof, not only on the finances of the School Board but on the education process as a whole in the school district. The fact that the prophesied results might be detrimental to the members of the JEA does not convert such prophecies into unlawful threats. Further, Collins' alleged criticism of the JEA, even assuming that said remarks inferred that the JEA was acting irresponsibly and improperly as the representative of the teachers in the employ of the school district, was not in violation of the statute. While we do not encourage such remarks, if we were to eliminate remarks critical of employe and of employer representatives from the bargaining process as prohibited practices, the process might collapse, perhaps from shock alone."

This position was reaffirmed in Lisbon-Pewaukee Joint School District No. 2., 14691-A (6/76).

Just as employes have a protected right to express their opinions to their employers, 7/ so also do employers enjoy a protected right of free speech 8/ in public sector collective bargaining. 9/ Accordingly, employers have long enjoyed the right to tell their employes what they have offered to their union in the course of collective bargaining. 10/ However, notwithstanding labor relations policies

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7/ Madison v. WERC, 97 S.Ct. 421 (1976).

8/ See Pittsburgh Steamship Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950), aff'd., 340 U.S. 498 (1951); NLRB v. Virginia Elec. Power Co. 314 U.S. 469 (1941).

9/ WERC v. Evansville, 69 Wis. 2d 140, 157, 230 N.W. 2d 688 (1975).

10/ See Tanner Motor Livery, Ltd., 160 NLRB No. 127, 63 LRRM 1242 (1966); T.M. Cobb, 224 NLRB No. 104, 93 LRRM 1047 (1976); Tobasco Prestressed Concrete Company, 177 NLRB No. 101, 71 LRRM 1565 (1969).

modeled on the NLRA favor "uninhibited, robust, and wide-open debate in labor disputes," 11/ employer statements must stop short of coercion, threats or interference with employe rights, 12/ and the employer statements must not constitute bargaining with the employes rather than their majority collective bargaining representative. 13/

Inaccurate employer statements, although in proper cases evidentiary of a violation of other statutes, are not themselves unlawful, since "there are instances when an innocent misstatement of fact may be harmless or the union may have the burden of correcting a misstatement." 14/ Rather, the test is whether by its statements the employer has violated the rights of employes, such as by interference, coercion or threats. 15/

Here, the employer's statements were in no way threatening or coercive, nor did they undermine the status of the association as the collective bargaining representative. The statements contained no actual or implied threats of reprisals, nor promises of additional benefits should the teachers accept or reject the employer's proposal. They simply described the impact upon the individual teachers of its bargaining proposal which previously had been submitted to the association.

Accordingly, we hold that the employer violated no provision of the Municipal Employment Relations Act by: (a) its communication

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11/ Old Dominion Br. No. 496 v. Austin, 418 U.S. 264, 273-274 (1974).

12/ WERC v. Evansville, supra, n.

13/ Madison Joint School Dist. No. 8 v. WERC, 69 Wis. 2d 200, 211-215, 231 N.W. 2d 206 (1975), reversed, 97 S.Ct. 421 (1976).

In reversing the Wisconsin court, the United States Supreme Court did not invalidate the exclusivity principle. Rather, it held that the teacher involved "did not seek to bargain or offer to enter into any bargain" with the school board, 97 S.Ct. at 425; it reserved ruling on the exclusivity principle in general, 97 S.Ct. at 426; and it held that during the course of a public meeting to hear the views of citizens, the public employer could not discriminate between speakers on the basis of their employment or the content of their speech. Id. Whatever doubt may have been raised as to the constitutionality of the exclusivity principle in public employment was removed, however, in Abood v. Detroit Board of Education, 97 S.Ct. 1782, 1792, 1796-97 (1977), where the Court ruled that the exclusivity principle warranted encroachments on First Amendment activity of public employes.

14/ WERC v. Evansville, supra, 69 Wis. 2d at 151.

15/ Id., 69 Wis. 2d at 151-157.

(by) the employer of its bargaining proposal, or (by) the contents of the communication.

Dated at Madison, Wisconsin this 3rd day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner