STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANESVILLE PUBLIC EMPLOYEES, LOCAL 523, AFSCME, AFL-CIO, Complainant, vs. JANESVILLE BOARD OF EDUCATION; ROBERT COLLINS, PRESIDENT; FRED HOLT, SUPERINTENDENT OF SCHOOLS; and WILLIAM YOUNG, DIRECTOR OF BUSINESS AFFAIRS, Respondents.	Case XIX No. 21763 MP-759 Decision No. 15590-A

Appearances:

Mr. Darold O. Lowe, District Representative, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, appearing on behalf of the Complainant.

Mr. T. P. Bidwell, Attorney at Law, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on June 14, 1977, alleging that the above-named Respondents had committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held before the Examiner in Janesville, Wisconsin, on July 26, 1977; 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 Janesville Public Employees, Local 523, AFSCME, AFL-CIO, herein Complainant, is a labor organization functioning as the collective bargaining representative of "all regular full-time and regular part-time employees of the Janesville Board of Education engaged in the duties of cleaning, maintaining and repairing school buildings and school grounds and in duties of preparing and serving food under the jurisdiction of the Board, but excluding supervisors, seasonal employees, professional employees, building secretarial employees and aides" employed by the Janesville Board of Education.

2. That the Janesville Board of Education, herein Respondent Board, is a municipal employer; that Robert Collins, herein Respondent Collins, is President of Respondent Board and functions as its agent; that Fred Holt, herein Respondent Holt, is employed as Superintendent of Schools by Respondent Board and functions as its agent; and that William Young, herein Respondent Young, is employed as Director of Business Affairs by Respondent Board and functions as its agent.

3. That the parties' 1976-1978 collective bargaining agreement provides for final and binding arbitration of unresolved disputes "concerning the interpretation or application of this agreement" and contains the following provisions:

"ARTICLE II
BOARD RIGHTS

2.01 The Union recognizes the Board of Education as the Employer and that the Board retains all rights, authority, duties, and responsibilities conferred upon and vested in it by laws. The Board has the right to operate the school system, including the establishing of and enforcing reasonable work rules, supervising and directing the work force, scheduling overtime hours, establishing job descriptions, and levels of performance of employees, and managing the affairs of the Board of Education provided this does not conflict with the provisions of this Agreement.

. . .

ARTICLE X
VACATION

10.01 Employees with less than one (1) year of continuous employment up to July 1st of each year shall be granted vacation on a pro-rated basis. Five-twelves [sic] (5/12) day of vacation shall be granted for each month or major fraction thereof.

10.02 Employees shall be granted one (1) week of annual vacation with pay after one (1) year of employment.

10.03 Employees shall be granted two (2) weeks of annual vacation with pay after two (2) years of continuous employment.

10.04 Employees shall be granted annual vacation with pay after ten (10) years of continuous employment as follows:

10 years - 3 weeks
17 years - 4 weeks
22 years - 5 weeks

10.05 Employees who work as custodians and are scheduled to work only during the school year will be granted vacation pay on a pro-rata basis."

4. That on or about March 30, 1977, Mark Kellor, an employe of Respondent Board who was a member of the bargaining unit represented by Complainant, voluntarily terminated his employment; that on March 30, 1977, Kellor was informed by an agent of Respondent Board that he would not receive three and one-quarter days of earned vacation benefits because he had failed to give adequate notice to Respondent Board regarding his termination; that Respondent Board had for five years required that an employe give at least one days' notice of termination if he was to receive earned vacation; that Kellor informed Complainant's Secretary of the denial of vacation pay due to inadequate notice; that this was the first time that the Complainant became aware of the existence of any such termination policy; and that the specific subject of said policy had never arisen in collective bargaining between the parties.

5. That on April 7, 1977, Kellor filed a grievance over the denial of vacation pay; that on April 14, 1977, Respondent Young denied the grievance at the second step of the grievance procedure; that on May 24, 1977, Mr. Darold O. Lowe, representative of Complainant, met with the Respondent Board at the third step of the grievance procedure and requested that Kellor be granted the vacation pay in question and further that Respondent Board bargain over any policy requiring that notice of termination be given in order to receive accrued vacation pay; that Respondent Board denied Kellor's grievance and refused to bargain over the notice policy in question until bargaining for a new contract commenced; and that the Complainant did not pursue the Kellor grievance to final and binding arbitration.

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

CONCLUSION OF LAW

That inasmuch as the parties' current collective bargaining agreement embodies the subject of an employe's right or lack thereof to accrued vacation benefits upon termination, Respondent Janesville Board of Education's refusal to bargain with Complainant Janesville Public Employees, Local 523, AFSCME, AFL-CIO regarding said subject does not constitute a violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

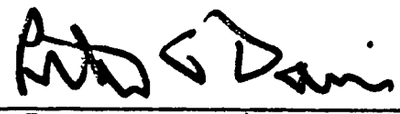
Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 17th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

JANESVILLE JOINT SCHOOL DISTRICT NO. 1, XIX, Decision No. 15590-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant alleges that the Respondents committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA by refusing to bargain with Complainant during the term of the parties' current contract over a policy requiring that a terminating employe provide certain notice of termination if he is to receive accrued vacation benefits. Respondents deny that they have illegally refused to bargain over such a policy by asserting that contractual silence regarding a terminating employe's right to accrued vacation allows management to establish and maintain a policy with respect thereto. Respondents also contend that labor peace would suffer if Complainant could reopen the existing contract to bargain about said policy and allege that if Complainant wishes to challenge the policy, it should utilize the contractually provided grievance and arbitration procedure.

DISCUSSION:

The record indicates that on April 7, 1977, Kellor filed a grievance protesting the Respondent's failure to grant him his accrued vacation benefits. Said grievance was processed through Step 3 of the contractual grievance procedure but was not pursued by Complainant to arbitration. Although it is difficult to categorize Respondent's arguments regarding the effect of Complainant's action, it would appear that Respondents are in essence contending that the Commission should not assert its jurisdiction in the instant matter because said dispute should more appropriately have been resolved through the available contractual procedure and/or because Complainant failed to exhaust said procedure before filing its complaint.

With respect to the exhaustion of remedies argument, the Commission will normally require that available contractual remedies be exhausted before asserting its jurisdiction to enforce collective bargaining agreements under Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) or under Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). 1/ However the instant case is not one of contract enforcement. Complainant's claim is limited to an assertion that Respondents have illegally refused to bargain in violation of Section 111.70(3)(a)4 of MERA. Therefore the exhaustion of remedies doctrine cannot appropriately be applied. 2/ The question of whether the Commission should assert jurisdiction over a dispute which allegedly could have been resolved in the grievance-arbitration process is more difficult to answer.

There is a line of Commission precedent which indicates that the possibility of relief through a contractually provided grievance-arbitration procedure does not preclude the Commission from fully adjudicating alleged noncontractual violations of the statutes which it enforces. 3/ However the Commission has also concluded that it

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1/ Amity Nursing Home 8425 (2/68); River Falls Cooperative Creamery 2311 (2/50); F. Hurlbut Company 4121 (12/5); Pierce Auto Body Works 6635 (2/64); Milwaukee Board of School Directors 12028 (5/74).

2/ City of Milwaukee 13093 (10/74).

3/ Milwaukee Elks 7753 (10/66); Milwaukee Board of School Directors and Vrsata 10663-A (3/72); Milwaukee Board of School Directors 11330-B (6/73).

may exercise its discretion and decline to determine the merits of those alleged statutory violations which can be submitted to and materially resolved by an arbitration proceeding. 4/ In such cases, the Commission defers resolution of the dispute to the arbitration process but may hold the statutory proceedings in abeyance instead of dismissing the complaint to insure that the arbitration award ultimately issued is not inconsistent with statutory policy under WEPA or MERA. The instant dispute presents a factual setting which is distinct from that in Milwaukee Elks, Vrsata and Milwaukee Board of School Directors inasmuch as deferral to the grievance-arbitration procedure is no longer an available option. While this line of cases would thus not appear to be directly applicable to the case at hand, the Commission could conceivably extend the Milwaukee Elks rationale and find that if the Union initially elects to pursue a grievance-arbitration remedy and said contractual procedure could materially resolve the alleged statutory violation, the Union will be bound by its election of remedies and the Commission will not exercise its jurisdiction even though the Union ultimately decides not to pursue the contractual procedure to its conclusion. It is the undersigned's belief that such a policy would be undesirable most importantly because it would mean that the statutory issue raised by the complaint would never be resolved in any forum. However, even if said policy were to be adopted, it would not apply to the instant situation because an arbitration proceeding could not materially resolve the statutory violation alleged herein. There is no indication from the record that the grievance filed by Kellor contained any reference to the refusal to bargain by Respondents. 5/ Indeed there is no contractually established duty to bargain that could reasonably be grieved in the instant matter. 6/ Thus, although an arbitrator would interpret the same contractual provisions when considering the grievant's contractual right to accrued vacation benefits as the Examiner might need to interpret to resolve the question of Respondent's statutory duty to bargain, the statutory issue itself could not be resolved. Therefore, the Examiner will proceed to an examination of the statutory issue raised by the instant complaint. 7/

Existence of Duty to Bargain

The Wisconsin Employment Relations Commission has concluded that a municipal employer's duty to bargain continues during the term of

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4/ Ibid.

5/ Neither party placed the grievance in the record. However, the answer to the grievance gives no indication that said issue was raised.

6/ In Article III the Board agrees to "promote an atmosphere of cooperation and harmony among all employees and to meet with representatives of the Union at mutually convenient times for the promotion of these objectives." In Article XI the Board agrees to discuss any change in the insurance carrier and in Article XVI the parties agree to "negotiate" a substitute for any portion of the bargaining agreement found to be unlawful. None of these Articles establishes a basis for a "refusal to bargain" grievance in the instant situation.

7/ An alternative analysis of the instant case (see McDonnell Aircraft Corp.; 109 NLRB, 930, (1954) and Cox and Dunlop, The Duty to Bargain Collectively During the Term of an Existing Agreement 63 Harv L. Rev. 1097 (1950) might find that Respondent's willingness to defend its action through the grievance-arbitration procedure satisfied its duty to bargain with respect thereto. The undersigned finds this analysis unpersuasive.

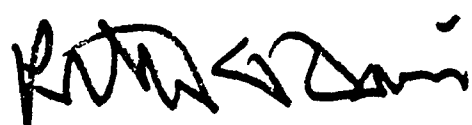
a collective bargaining agreement with respect to all mandatory subjects of bargaining except those which are embodied in the terms of the agreement or those with respect to which the employe representative has waived interim bargaining through bargaining history or specific contract language. 8/ Thus Respondents have a duty to bargain with Complainant during the term of the existing agreement over a terminating employe's vacation rights if said subject is a mandatory subject of bargaining which is not embodied in the agreement and with respect to which Complainant has not waived its right to bargain.

The Examiner finds it unnecessary to determine whether the issue in question is a mandatory subject of bargaining because it is concluded that the parties' collective bargaining agreement does in fact embody the subject of a terminating employe's vacation rights or the lack thereof. Although the record clearly indicates that the parties have never specifically discussed said subject, they have bargained a vacation clause which, in conjunction with other possibly relevant contractual provisions, completely defines an employe's rights or lack thereof to vacation benefits. Although the bargaining agreement does not explicitly focus upon a terminating employe's right to accrued vacation benefits or a myriad of other potential vacation issues which could arise during the term of the agreement, its terms and provisions are nonetheless capable of resolving all such issues. To conclude that the bargaining agreement is silent on the subject because it does not explicitly focus upon said issue would be to ignore the fact that a contract cannot possibly deal specifically with all the potential problems which are generated in an employer-employe relationship. Yet, despite the fact that it cannot be all-inclusive, the bargaining agreement is capable, through interpretation, of defining the parties' rights in virtually all areas including that at issue herein. Having therefore concluded that the subject of the vacation rights of terminating employes is in fact embodied in the existing bargaining agreement, it is concluded that Respondents do not have a duty to bargain with respect thereto.

In reaching the foregoing conclusion and resolving the statutory issue raised by the complaint, it has not been necessary for the Examiner to define what contractual rights, if any, an employe has to accrued vacation benefits upon termination. Given the absence of any evidence that the parties wished to have that contractual question resolved in the instant proceeding, this question will remain potential grist for the arbitral mill.

Dated at Madison, Wisconsin this 17th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

8/ City of Brookfield (11489-B) 4/75; Nicolet Jt. High School Dist. No. 1 (12073-B, C) 10/75.