STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MADISON METROPOLITAN SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and MADISON TEACHERS, INC.	Case LXXX No. 23097 DR(M)-93 Decision No. 16598-A

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On October 6, 1978, the Commission issued its Findings of Fact, Conclusions of Law and Declaratory Ruling in the above-entitled matter, wherein if found inter alia that the proposal of Madison Teachers Inc. (MTI) made in bargaining with Madison Metropolitan School District (District) regarding replacement employes was a permissive subject of bargaining. On November 2, 1978 the Petitioner (District) filed a request with the Commission that it render an "informal opinion" with regard to the mandatory or permissive nature of said proposal, as modified by MTI subsequent to the Commission's Declaratory Ruling. Thereafter the parties agreed that the Commission should issue an expedited decision on the District's request based on their written statements of position and the parties waived further hearing in the matter. Pursuant to that agreement the District submitted a statement of position on December 11, 1978 and MTI submitted its statement on December 21, 1978. On January 2, 1979 the District advised the Commission that it did not wish to file a reply. On the basis of the position statements of the parties, and the record in this proceeding, the Commission issues the following Supplemental Findings of Fact, Conclusion of Law and Declaratory Ruling.

SUPPLEMENTAL FINDINGS OF FACT

1. On May 30, 1978, after the District and MTI had submitted their proposed final offers in response to the solicitation of the Commission's investigator as described in Findings of Fact No. 4 of our original decision herein, the District advised the investigator that it believed that MTI's offer included permissive subjects of bargaining and that the District intended to seek a declaratory ruling from the Commission concerning the obligation of the District to bargain such subjects. The investigator directed the District to reduce its objections to writing and identify the proposals claimed to involve nonmandatory subjects of bargaining and the basis for such claim. By letter dated June 2, 1978 and received by the Commission on June 5, 1978, the District submitted its written objections as requested. In said letter the District contended that a number of MTI's proposals, including its proposal with regard to replacement employes set out in Finding of Fact No. 4 at subparagraph (f) of our original decision 1/,

1/ As noted in our decision, at page 6, MTI modified its proposal slightly at the hearing in order to eliminate one of the District's two specific objections to this proposal which were raised at the hearing.

failed to relate fundamentally to wages, hours and conditions of employment and contended that they primarily dealt with management's prerogative to determine staffing levels and duties to be performed by individuals holding such positions. On June 6, 1978 the instant petition for declaratory ruling was filed. At the hearing the District initially reiterated its general claim that MTI's replacement employe proposal dealt with management's prerogative with regard to "staffing" but never identified any specific aspect of the proposal to which it objected other than the reference to "suitable" replacements.

2. In its post-hearing brief the District's sole substantive objection to MTI's proposal with regard to replacement employes as modified at the hearing was that, by requiring the hiring of "suitable" replacements, the proposal invaded the power of the District to determine qualifications of replacement employes. In its Declaratory Ruling the Commission found that said proposal related primarily to the formulation or management of public policy and concluded that it was a permissive subject of bargaining within the meaning of Section 111.70(1)(d) and stated its rationale as follows:

> "Addressing ourselves to the District's single pending substantive objection to the proposal, we find it well taken. The testimony of MTI's Assistant Executive Director established that this proposal was intended to serve two purposes: to preserve the job rights of an employe on a leave of absence, and to 'maintain the workload of others; in other words, those people who do not go on leave may end up having to perform the duties and responsibilities of the individual who is gone on leave. So, by hiring a replacement during a period while one employee is on leave would [sic] absorb the work . . .'
>
> "We find the proposal's relationship to wages, hours and conditions of employment reflected in those concerns more oblique than its relationship to the formulation or management of public policy involved in the determination of the qualifications for initial hire of replacement personnel. Therefore, limiting our consideration herein to the sole substantive objection raised by the District, we find that objection to be well taken, and the proposal to be a permissive subject of bargaining."

3. After our Declaratory Ruling MTI modified its proposal by eliminating the word "suitable" thereby eliminating the sole basis for the Commission's finding and conclusion with regard to said proposal, so that MTI'sproposal now reads as follows:

> "Should an employee temporarily vacate his/her position in excess of one semester or more or its equivalent and the employer desires to have his/her duties performed during his/her absence, the employer will secure a temporary replacement employee. Said replacement employee shall be employed by the terms of this Agreement but only during the period for which the regular employee is absent." 2/

2/ Initially MTI inadvertently included the language which it had modified at the hearing on July 5, 1978. On November 6, 1978 MTI wrote the District correcting this error.

4. In requesting that the Commission find that MTI's replacement employe's proposal, as modified, is a nonmandatory subject of bargaining, the District makes the following arguments, none of which were asserted in its post-hearing brief filed pursuant to the agreed arrangements on post-hearing briefs;

> "2. It is the District's belief that the Union's proposal attempts to establish a condition which must be met before the Employer is able to replace an employee. Specifically, the Employer's opportunity and its ability to determine policy regarding replacement employees is limited by the proposed language which qualifies the Employer's ability to replace an employee by imposing the necessity of the absence being 'in excess of one semester or more or its equivalent.'
>
> In addition to the above, the Union's proposal would appear to obligate the District to employ additional staff - beyond already existing staff. That is, the District would be obligated to hire additional staff even though it may have existing bargaining unit staff available.
>
> 3. Absent agreement, the District does not concur that the Union has been accorded rights of representing replacement employees for the employee group known as Other Related Professionals."

5. The District did not previously raise any of the arguments set out in Supplemental Finding of Fact No. 4 with regard to MTI's proposal set out in Supplemental Finding of Fact No. 3, which is identical in all respects except for the deletion of the word "suitable". By failing to raise any of the arguments set out in Supplemental Finding of Fact No. 4 prior to the Commission's original ruling in the matter, the District waived its right under Section 111.70(4)(cm)(6)(a) Stats., to object to any other aspect of said proposal.

CONCLUSION OF LAW

Because the District has, by its conduct waived its right to object to any other aspect of MTI's proposal set out in Supplemental Finding of Fact No. 3, said proposal is considered to be a mandatory subject of bargaining for purposes of the MTI's petition for mediation-arbitration in Case LXXIX, within the meaning of Section 111.70 (4)(am)6.a. Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law the Commission enters the following

DECLARATORY RULING

MTI's proposal with regard to replacement employes set out in Supplemental Finding of Fact No. 3 is a mandatory subject of bargaining within the meaning of Section 111.70(1)(e) Stats. for purposes of MTI's pending petition for mediation-arbitration in Case LXXIX.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney

Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz

Marshall L. Gratz, Commissioner

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

In our original decision in this matter we noted that the District's sole objection to MTI's replacement employe proposal was based on the requirement that it obtain a suitable replacement. We, therefore did not consider any other possible objections that might have been raised with regard to said proposal, such as those contained in the District's statement of position set out in Supplemental Finding of Fact No. 4.

MTI contends that the replacement employe proposal as it is now written relates primarily to wages, hours and working conditions. In addition it objects to the District's attempt to raise any objection to the proposal which it failed to raise at the time of the original hearing herein. In the latter regard, MTI argues as follows:

> "In its prior Petition for a Declaratory Ruling (Case LXXX No. 23097 DR(M)-93 Dec. No. 16598 (10/1/78)), the District's one and only substantive objection to the 'Replacement Employees' proposal was that it required the hiring of a "suitable" replacement and that in so doing the language of the proposal invaded the power of the District to determine the qualifications of replacement employees. The Commission agreed with the District in this regard.
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> MTI, thereafter, modified the language of the "Replacement Employee" proposal. MTI struck the work "suitable", hence as the proposal now reads there is no restriction, even arguably, on the District's ability to determine the qualifications of replacement employees.
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> . . .
>
> The rules of procedure relating to mediation-arbitration (see Wis. Administrative Code, Chapter 31) are clear. Objections to proposals on the basis that such proposals relate to a non-mandatory subject of bargaining must not only be made in writing, identifying the proposal claimed to involve a non-mandatory subject as well as the basis for such claim, but such objections must be made on a timely basis (see ERB 31.11(b) and ERB 31.12(3).)
>
> Here the time for filing such objections has long passed. Nevertheless, the District now raises additional grounds for objection to the Replacement Employee proposal and for the first time.
>
> These objections do not relate solely to the revised proposals. Indeed, such objections could well have been raised as concerns the original proposal and in the prior proceeding. It is therefore MTI's position that the District, having failed to make such specific objections on a timely basis in the prior proceeding, are barred procedurally from making such objections for the first time now. The District's petition herein, being based on objections which could have been previously made, is now untimely and should, we respectfully submit, therefore be dismissed.
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> To hold otherwise is to allow one party to cause great periods of delay -- merely by requesting a series of

declaratory rulings on separate issues which well could have been made on a timely basis and in one proceeding.

. . .

The District's objections or grounds for objection are not unique to the amended proposal, but could just as well have applied to the original proposal. Thus such objections are now untimely made and should be dismissed."

We agree that the District should be deemed to have waived any objection to MTI's replacement employe proposal other than the objection identified at the hearing and argued in its post-hearing brief. The Commission's rules 3/ allow either party to raise the question

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3/ "ERB 31.11 Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining. (1) Time for raising objection. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing.

(a) During negotiations, mediation or investigation. Should either party, during negotiations or during commission mediation or investigation raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, either party may commence a declaratory ruling before the commission pursuant to s. 111.70(4)(b), Stats., and chapter ERB 18, Wis. Adm. Code seeking a determination as to whether the proposal or proposals involved relate to a non-mandatory subject or subjects of bargaining.

(b) At the time of call for final offers. Should either party, at such time as the commission or its agent calls for and obtains and exchanges the proposal final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, such offers shall not be deemed to be final offers and the commission or its agent shall not close the investigation or hearing but shall direct the objecting party to reduce the objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for such claim. Such objection shall be signed and dated by a duly authorized representative of the objecting party, and copies thereof shall, on the same date, be served on the party, as well as the commission or its agent conducting the investigation or hearing, in the manner and within such reasonable time as determined by the commission or its investigator.

(2) Effect of Bargaining on Permissive Subjects. Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection as set forth in par. (1)(b) above."

of the mandatory nature of any of the other party's proposals at any time during negotiations and before the investigation is closed. Nevertheless, they are encouraged to attempt to "bargain around the problem" by Section ERB 31.11(2) Wis. Adm. Code 4/ which expressly provides that bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation, shall not constitute a waiver of the right to file objections under Section ERB 31.11(1)(b) Wis. Adm. Code. 5/

Section ERB 31.11(1)(b) Wis. Adm. Code 6/ provides that either party can wait until the "eleventh hour", before the investigation is closed and their final offers become final, to file their objections. The purpose of this rule is to provide the parties with every reasonable opportunity to narrow, if not settle, all of the issues in dispute without unduly prolonging the process. However this rule is also intended to implement the legislative intent that "[p]ermissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject". 7/

The District's subsequent objections are not unique to the proposal, as amended, and could easily have been identified at the hearing and argued in its post-hearing brief. By failing to raise the arguments in question until after the Commission had already rendered its decision and MTI had amended its proposal to specifically overcome its one substantive objection which was argued and was found to be meritorious, we deem that the District has waived its right to raise other objections to the proposal. Even if it could be said that the District has not waived its right to raise additional objections, we believe it should be estopped from doing so. To conclude otherwise would be to encourage piecemeal litigation and allow one or the other party to engage in dilatory tactics contrary to the policy of the statute and the intent of our rules, namely to encourage voluntary settlements but that if voluntary procedures fail, to ensure that the parties have available to them a fair, speedy and above all peaceful procedure for settlement. 8/

Dated at Madison, Wisconsin this 12th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
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4/ Supra note 3.

5/ Supra note 3.

6/ Supra note 3.

7/ Section 111.70(4)(cm)(6)(a) Stats.

8/ See Section 111.70(6) MERA and Section ERB 31.02 Wis. Adm. Code.