STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| In the Matter of the Petition of<br><br>MADISON METROPOLITAN SCHOOL DISTRICT<br><br>Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and<br><br>MADISON TEACHERS INCORPORATED | Case LXXXIX<br>No. 23702 DR(M)-104<br>Decision No. 16751 |

Appearances:

Isaksen, Lathrop, Esch, Hart & Clark, Attorneys at Law, by Mr. Gerald C. Kops, appearing on behalf of Madison Metropolitan School District.

Kelly, Haus and Cullen, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of Madison Teachers Incorporated.

DECLARATORY RULING

The Madison Metropolitan School District having, on November 2, 1978, filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission issue a declaratory ruling, pursuant to Sec. 111.70 (4)(b) of the Municipal Employment Relations Act, as to whether certain proposals alleged to have been presented by Madison Teachers, Inc. during negotiations between the parties, involve mandatory subjects of bargaining; and on November 21, 1978, Madison Teachers, Inc. having filed pleadings with the Commission wherein said employe organization contended that the Commission lacks jurisdiction to issue such a declaratory ruling, that five of the six alleged proposals involved are contained in an existing collective bargaining agreement and continue in full force and effect until changed by mutual agreement or by an award of a mediator-arbitrator, and that, in any event, the alleged proposals involved related to mandatory subjects of bargaining; and the parties having agreed that the initial hearing in the matter be limited to the issue as to the duration of the collective bargaining agreement, effective January 1, 1977, between the parties, and its effect, if any, on the matters contained in the petition filed herein; and hearing having been held at Madison, Wisconsin on November 22 and 27, 1978, before Chairman Morris Slavney and Commissioner Marshall Gratz; and after the receipt of copies of the transcript, the parties having filed briefs by December 14, 1978; and the Commission 1/ having considered the evidence and the arguments and briefs of Counsel, and, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law, Declaratory Ruling, and Order For Further Hearing.

---

1/ As the parties were informed at the pre-hearing conference herein, because Commissioner Torosian is the investigator in the matter of MTI's pending petition for mediation-arbitration of the underlying contract negotiation dispute, he will not participate in the resolution of the issues involved in the instant declaratory ruling proceeding unless circumstances develop which require his participation.

## FINDINGS OF FACT

1. The above-named petitioner, referred to herein as the District, is a municipal employer with a mailing address of 545 West Dayton Street, Madison, Wisconsin 53703.

2. Madison Teachers Incorporated, referred to herein as MTI, is a labor organization with a mailing address of 121 South Hancock Street, Madison, Wisconsin 53703.

3. MTI is the exclusive collective bargaining representative of, inter alia, a bargaining unit consisting of:

> "all regular full-time and regular part-time teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by the District including psychologists, psychomotrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, Title I coordinator, guidance counselors, teaching assistant principals (except at Sunnyside School), teachers on leave of absence, and teachers under temporary contract, project assistants, principal investigators, researchers and photographer technician, but excluding supervisor - cataloging and processing, on call substitute teachers, interns, and all other employes, principals, supervisors and administrators."

4. On April 18, 1977 and July 29, 1977 representatives of the District and representatives of MTI respectively affixed their signatures to a collective bargaining agreement commencing January 1, 1977, which provided, in material part, as follows:

"TEACHERS' COLLECTIVE BARGAINING AGREEMENT

January 1, 1977 - October 15, 1978

. . .

Effective Dates

This document entitled Collective Bargaining Agreement (Master Contract) - Madison Board of Education - Madison Teachers Incorporated, January 1, 1977 - October 15, 1978 is effective as of January 1, 1977 and shall continue in force until changed by later agreement. If new agreements are reached, a new master agreement shall be published which shall contain all present agreements published herein and such changes, additions or deletions as shall be mutually agreed to.

. . .

II - Procedure - A

A. CONFERENCE AND NEGOTIATION

1. This agreement effective upon execution between the BOARD OF EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT hereinafter referred to as the 'Board of Education', and also referred to as 'the Employer', or 'Madison Public Schools', or 'the District'; and MADISON TEACHERS INCORPORATED, hereinafter referred to as 'Madison Teachers', and also referred to as 'MTI', or 'the Union'.

2. The Board of Education and Madison Teachers each regognize its legal obligation imposed by Section 111.70 of the Wis-

consin Statutes to meet for the purposes of negotiating in good faith at reasonable times in a bona fide effort to arrive at a settlement on questions of wages, hours and conditions of employment. Without limiting this legal obligation, the parties to this agreement agree as follows:

a. All terms initially proposed to be negotiated for the contract period commencing October 16, 1978 shall be submitted to the duly authorized agent of the other party in writing and according to the timetable set forth in this Agreement. The limitation of initially proposed items for negotiation to those in written form and in accordance with the attached timetable shall not prevent the unilateral introduction of new items by either party from time to time during the period of negotiation.

b. Timetable - All items initially proposed for negotiations shall be presented as follows:

1. The presentation of initial proposal for the succeeding Agreement shall be made on or about the 45th day prior to the expiration of the Agreement and shall be open to the public.

2. The first negotiation session for the succeeding Agreement shall be scheduled by mutual agreement of the parties to be held on or about 45 days prior to the expiration of the Agreement and shall be open to the public. Subsequent sessions shall be closed unless the parties mutually agree otherwise.

3. Ideally, agreement by the agents should be reached by October 1 preceding the expiration of the contract at which such time ratification by the principal parties will be considered. At such time as the Agreement is reached, the economic benefits agreed upon will be retroactively provided teachers to the beginning of the then current school year.

. . .

h. If after a reasonable period of negotiations the parties to this agreement are deadlocked in the opinion of either or both of the parties, factfinding by the Wisconsin Employment Relations Commisssion may be initiated by the party or parties so feeling, pursuant to Section 111.70 (4)(e) of the Wisconsin Statutes.

. . .

j. Madison Teachers recognize the legal obligation of the Board of Education to give to each teacher employed by it a written notice of renewal or refusal of his or her contract for the ensuing school year on or before March 1 of the school year during which said teacher holds a contract, pursuant to Section 118.22 of the Wisconsin Statutes. Preliminary notice shall be given at least 15 days prior should the Board be considering non-renewal. Such teachers have five days from the date of receipt of such notice to request a conference. In the event an agreement concerning wages, hours and conditions of employment has not been reached by the Board of Education and Madison Teachers by the date teacher contracts are given to said teachers, all such contracts shall be governed by the terms of any agreement con-

cerning wages, hours and conditions of employment for said ensuing year subsequently reached by the parties to this agreement.

. . .

V - Factors Relating to Employment
Classroom - O

O. SCHOOL CALENDAR

. . .

It is agreed and understood by the parties hereto that the portion of the 1977-78 school calendar which extends beyond midnight, October 15, 1978, is only tentatively agreed upon and is included herein for the convenience of the parties and those affected by the school calendar. Such portion of the school calendar as designated in this paragraph is not binding on either of the parties to this Agreement.

. . .

VIII - Other Board and MTI
Agreements - F

F. ADOPTION OF BOARD POLICIES

1. All policies of the Board of Education affecting teachers' wages, hours and conditions of employment shall remain in effect unless changed by mutual agreement by the Board of Education and Madison Teachers. This agreement shall be binding on each of the parties for the period January 1, 1977 to October 15, 1978, the duration of this Collective Bargaining Agreement.

. . .

VIII - Other Board and MTI
Agreements - H

H. WORKSTOPPAGE

The Board of Education and MTI subscribe to the principle that differences of opinion between the parties should be resolved by the peaceful means available without interruption of the school program. Therefore, MTI agrees that there will not be any strikes, workstoppages or slowdowns during the life of this Agreement, i.e., for the period commencing January 1, 1977 and ending October 15, 1978. Upon the notification of the President and Executive Director of MTI by the District of any unauthorized concerted activity, as noted above, MTI shall notify those in the collective bargaining unit that it does not endorse such activity. Having given such notification, MTI shall be free of all liability in relation thereto.

The Board of Education agrees that it will not lock-out collective bargaining unit members during the period specified above."

5. The parties' negotiations for a successor agreement to the 1977-78 agreement commenced on or about September 1, 1978. The parties were unable to come to a complete agreement between themselves, and, on October 18, 1978, MTI filed a petition for mediation-arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., with the Commission.

6. During the course of said investigation, the District filed the instant petition wherein it alleged, inter alia, that MTI's most recently submitted proposed final offer contains proposals for the inclusion of six items in the successor agreement, five of which are contained in the 1977-78 agreement, and that all six of those items, in whole or in part, consist of nonmandatory subjects of bargaining. The District's petition requests the instant declaratory ruling to those effects.

7. In response to the instant petition, MTI has filed pleadings requesting dismissal of the petition as regards the five 1977-78 agreement provisions cited in the petition on the grounds that the District has waived its right to object to the alleged nonmandatory nature of such provisions by having agreed to the 1977-78 agreement (which, according to MTI continues a majority of its terms in effect indifinitely until changed by mutual agreement or by a mediation-arbitration award) and that the MTI-proposed final offer need not and does not contain proposals for inclusion of those five provisions in the successor agreement.

Based on the foregoing Findings of Fact, the Commission issues the following

## CONCLUSION OF LAW

By agreeing to the 1977-78 agreement, the District did not waive its rights under Sec. 111.70(4)(cm)6.a., Stats., and ERB 31.11, Wis. Adm. Code, to avoid, by timely objection, both the submission to mediation-arbitration of provisions involving nonmandatory subjects of bargaining contained in the 1977-78 agreement and the inclusion of such subjects in a successor agreement.

Based on the foregoing Findings of Fact and Conclusion of Law, the Commission issues the following

## DECLARATORY RULING

The parties' 1977-78 agreement does not preclude the District from seeking and relying upon a declaratory ruling as to the mandatory or nonmandatory nature of the five 1977-78 agreement provisions cited in the District's petition herein in connection with its negotiations with MTI concerning a successor agreement to the 1977-78 agreement.

## ORDER FOR FURTHER HEARING

A hearing on the remaining issues in this case shall be conducted as follows:

Date: Monday, January 22, 1979

Time: 9:30 a.m.

Location: Wisconsin Employment Relations Commission Offices
14 West Mifflin Street, Suite 200
Madison, Wisconsin.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Marshall L. Gratz
Marshall L. Gratz, Commissioner

## MEMORANDUM ACCOMPANYING DECLARATORY RULING

Background:

The Commission's processing (investigation) of MTI's petition for mediation-arbitration to resolve the parties' contract negotiations dispute about the terms of a successor agreement to their 1978-79 agreement was interrupted when the District objected that MTI's proposed final offer contained certain nonmandatory subjects of bargaining. 2/ Shortly thereafter, the District petitioned the Commission to issue a declaratory ruling on the merits of its objections to five portions of the 1977-78 agreement and one MTI proposal for addition of a new contract provision.

In its petition, the District asserted that the parties' 1977-78 agreement had expired on October 15, 1978; and that the proposed final offer of MTI contained proposals both that the five 1977-78 provisions cited in petition be carried forward in the successor agreement and that the other language item cited in petition be newly added to the successor agreement. At the November 17 pre-hearing conference, the District specified the portions of the cited items to which it objected and the bases for those objections.

MTI responded, both at the pre-hearing conference and later in a writte Answer and Motion, denying that the 1977-78 agreement had expired on October 15, 1978 and denying that the MTI's most recent proposed final offer contained proposals that the 1977-78 provisions cited in the District's petition be carried forward in the successor agreement. Instead, MTI contends that the 1977-78 agreement is of indefinite duration and subject to change only by mutual agreement or mediation-arbitration award. Hence, MTI argues, the District, by agreeing to that agreement of indefinite duration, waived its right to seek and rely upon a declaratory ruling that any of the existing 1977-78 agreement provisions are nonmandatory. MTI further contends that if the District wishes to remove an existing 1977-78 provision -- whether mandatory or nonmandatory -- from the successor agreement, it may seek that result only through mutual agreement or by prevailing in a mediation-arbitration award on the merits of the District's proposed contractual change.

Based on those arguments, MTI has requested that the declaratory ruling petition be dismissed as it relates to the 1977-78 agreement provisions cited therein. MTI apparently concedes that the District's assertion that the MTI proposal to add the new language cited in the petition, in the successor agreement, is a proper subject for a declaratory ruling petition.

The parties agreed that their dispute as to the duration of the 1977-78 agreement and its effect on the petition should be heard and decided by the Commission before any other issue in the declaratory ruling proceeding is addressed. In addressing that issue herein, the Commission, in the

---

2/ Section 111.70(f)(cm)6.a., Stats., provides, in part, as follows:

> ". . . Prior to the close of the investigation [pursuant to a petition for mediation-arbitration of a contract negotiation dispute] each party shall submit in writing its single final offer containing its final proposals on all issues in dispute to the commission. Such final offers may include only mandatory subjects of bargaining. Permissive 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. . . ."

interest of avoiding unnecessary delays in issuance, has limited itself to an abbreviated statement of the parties' positions and of the respective rationales for the instant determination of Chairman Slavney and Commissioner Gratz. Most of the 1977-78 agreement provisions relied on by the parties are set forth in Finding 4, above.

Position of MTI:

Here, as in Oak Creek Schools, 3/ the municipal employer voluntarily restricted or waived its non-duty to collectively bargain as regards the inclusion of permissive subjects in a successor agreement. The District here did so by agreeing in the EFFECTIVE DATES and CONFERENCE AND NEGOTIATION provisions that the 1977-78 agreement provisions are of an indefinite duration and subject to change (or, therefore, deletion) only by mutual agreement (or, given the interim advent of the med-arb law, by mediator-arbitrator award).

That interpretation is consistent with the balance of the agreement and, unlike the District's, gives effect to all parts of it. The terms "expiration of the contract" and "expiration of the agreement" in CONFERENCE AND NEGOTIATION were used not to connote a terminal date when all rights and benefits under the agreement cease, but rather in an "alternative" sense, also recognized in labor relations parlance, 4/ to wit, to connote "an agreed date in the course of the agreement's existence [October 16, 1978] upon which the parties can effect changes in its provisions." 5/ To apply the "terminal date" definition would be to render portions of the EFFECTIVE DATES provision meaningless. The "duration of the Collective Bargaining Agreement" reference in ADOPTION OF BOARD POLICIES was intended to apply only to that clause. Similarly, the "life of this Agreement" reference in WORKSTOPPAGE was intended only to terminate the no-strike pledge on October 15, 1978, not the balance of the 1977-78 agreement. The proviso that the SCHOOL CALENDAR 1978-79 is not binding after October 15, 1978 was needed only to differentiate that provision from the vast majority of the remaining portions of the agreement which the parties understood would continue indefinitely thereafter.

As with the 1977-78 master agreement, the May 1977 Memorandum of Agreement clearly continues until changed by mutual agreement except that the two sections thereof containing specific termination dates terminate on October 15, 1978. The District has confirmed its understanding to this effect in that it has treated Section XI of that Memorandum as terminated whereas it has not treated any other provision thereof or of the 1977-78 agreement as terminated on October 15, 1978.

The District waived its non-duty to bargain as to unaltered continuation of permissives into the successor agreement, and with full knowledge of the fact that it was doing so. The District's current chief negotiator admits that the District viewed the parties' 1975 agreement as continuing indefinitely after December 31, 1975 under 1975 agreement EFFECTIVE DATES language materially the same as that in the 1977-78 agreement except that December 31, 1975 appeared where October 15, 1978 now appears. Hence, the District sent a letter to each employe in the unit on January 2, 1976 assuring them that "both the individual teacher contract and the Master labor contract continue until modified" in an effort to avert a teacher walk-out then threatened in response to the absence of agreement on terms of a successor agreement. The additions, since that time, of references to "expiration", "duration" and "life" of the agreement in the ADOPTION OF BOARD POLICIES, WORKSTOPPAGE, CONFERENCE AND NEGOTIATION, and SCHOOL CALENDAR provisions do not, for the reasons noted above, warrant the District's pro-

---

3/ Oak Creek-Franklin City School District No. 1 (11827-D), 9/74.

4/ Citing, NLRB v. Lion Oil Co., 352 U.S. 282, 39 LRRM 2296 (1957).

5/ Citing, Id.

posed conclusion that the meaning of the 1977-78 agreement as a whole has changed the undisputed meaning attributed to the EFFECTIVE DATES language in the 1975 agreement. Consistent with its understanding to that effect, the District unsuccessfully proposed to materially alter the EFFECTIVE DATES provision in the negotiations leading to the 1977-78 agreement; and the District successfully argued in the "make-up days case" 6/ and in the "calendar case" 7/ that the 1975-76 school calendar contained in the 1975 agreement continued in effect after December 31, 1975.

For the foregoing reasons, the WERC would be exceeding its jurisdiction if it were to adopt the District's position herein. MTI has not made any proposal on the provisions recited in petition Appendices A-E, so there is no proposal about which the District may object about or obtain a declaratory ruling pursuant to Sec. 111.70(4)(cm)6.a., ERB 31.11 or Sec. 111.70 (4)(b). No such proposal was needed since those provisions continue in effect unless changed by mutual agreement or award. The EFFECTIVE DATES language clearly constitutes an agreement to treat permissive subjects in the 1977-78 agreement as mandatory for purposes of negotiations and mediation-arbitration regarding a successor. A WERC determination to the contrary would effectively delete or alter that term in a manner beyond the agency's authority.

Therefore, the District's petition should be dismissed as regards the five 1977-78 agreement provisions cited therein.

Position of the District:

The plain and clear language of the 1977-78 agreement "conveys the distinct idea that the agreement expired on October 15, 1978." Contract changes made in the negotiations leading to the 1977-78 agreement make the parties' mutual intent to that effect clear. The CONFERENCE AND NEGOTIATION provision was modified to include, for the first time, a reference to the existence of a date of "expiration of the Agreement" and of "expiration of the contract." The SCHOOL CALENDAR was modifed so as to expressly provide that the portion of the 1978-79 calendar after October 15, 1978 was not binding -- a provision that would have been unnecessary if the parties understood the entire agreement to continue thereafter subject only to a mutual agreement to change same. the WORKSTOPPAGE language was added, including an identification of ". . . the period commencing January 1, 1977 and ending October 15, 1978" as ". . . the life of this Agreement", and MTI Executive Director Matthews testified that capitalization of "Agreement" refers to the entire document 8/ (and therefore not to just one particular portion thereof). And, the ADOPTION OF BOARD POLICIES provision was modified so as to add "the duration of this Collective Bargaining Agreement" as an appositive to "the period January 1, 1977 to October 15, 1978." The clear meaning of those provisions is that the 1977-78 agreement expired on October 15, 1978.

However, reading those provisions together with the EFFECTIVE DATES provision, the latter can be reasonably interpreted and given effect as an indication of the parties' intent that the agreement ". . . merely continues . . . until a new agreement is reached." 9/

The additional conclusion urged by MTI -- that the District agreed in EFFECTIVE DATES to a perpetual contract so as to waive its non-duty to bar-

---

6/ (14365) 2/76.

7/ (14716-C) 6/77.

8/ Citing, Tr. 99.

9/ District brief at 23.

gain about the inclusion of permissive subjects in a successor agreement -- is not required or supported by the agreement read as a whole.

Even if the 1977-78 agreement is deemed ambiguous on the issue in dispute, the record clearly supports the District's interpretation. For, MTI led the District reasonably to believe that MTI considered the Master agreements to be of a definite duration. Specifically, MTI so informed its membership on numerous occasions regarding the anticipated expiration of the 1975 agreement; an MTI witness in the "make up days" case so testified before the WERC; MTI's Executive Director so swore in an affidavit on February 4, 1976; MTI drafted and agreed to the language changes noted above that were made in the negotiations leading to the 77-78 agreement; and at no time during those negotiations did MTI give the District any reason to believe that MTI intended by its proposed language to establish either a special meaning for "expiration" or a waive of the right to object to the permissive nature of provisions contained in the 1977-78 agreement in connection with the negotiations of a successor agreement.

Since the January 1, 1977 effective date of the 1977-78 agreement, MTI has demonstrated by its statements and actions that it shares the District's view that the contract is not perpetual. MTI did so by drafting and agreeing to the terms of the parties' May, 1977 Memorandum of Agreement, expressly providing that two sections thereof ". . . run concurrent with the Teacher Collective Bargaining Agreement between the parties and therefore expire October 15, 1978"; by declaring that the "termination date" of the 1977-78 agreement "is October 15, 1978" in its Notice of Commencement of Negotiations filed with the WERC and the District on June 22, 1978; by declaring that the 1977-78 agreement "expires on October 15, 1978" in its petition for mediation-arbitration filed with the WERC and the District on October 18, 1978; and by presenting its internal research materials to the District during the negotiations, identifying October 15, 1978 as the "ending date" of the 1977-78 agreement.

Moreover, the EFFECTIVE DATES provision does not equate a mediation-arbitration award with mutual agreement as a means of changing what MTI would have the Commission treat as a perpetual agreement. Therefore, MTI's position would require the conclusion that neither party has a duty to bargain at any time about any proposed change in the 1977-78 agreement terms. Such a perpetual agreement would contravene the three year maximum duration of a collective bargaining agreement provided in Sec. 111.70(3)(a)4, Stats.

Rejection of MTI's position herein does not require a remand of the matter for further investigation prior to Commission hearing of the merits of the District's petition. For, the MTI's most recently submitted proposed final offer, on its face, proposes the first two of the 1977-78 agreement provisions cited in the petition, and the language of the other three can be imputed to that offer on the basis of MTI's Counsel's hearing statement that MTI desires and intends that all provisions not addressed in the stipulation of agreed items or in its final offer shall be carried forward in the successor agreement as they appeared in the 1977-78 agreement. 10/

Discussion:

Opinion of Commissioner Gratz

Interpreting the 1977-78 agreement as a whole and in a way that gives lawful effect to all provisions thereof, I conclude that the provisions of that agreement technically expired on October 15, 1978 but that those not specifically providing otherwise continued in effect until a successor agreement is implemented. I have so concluded for the following reasons.

---

10/ Citing Tr. 47.

The heart of MTI's position herein is that the EFFECTIVE DATES provision constitutes an express agreement that those 1977-78 agreement provisions not containing their own specific termination dates will carry forward in the successor agreement unless there is mutual agreement otherwise or a mediation-arbitration award providing otherwise. It necessarily follows from that position that any one party is precluded from ever unilaterally terminating any 1977-78 agreement provision not containing its own specific termination date unless that party obtains a mediation-arbitration award to that effect. Since an award terminating all such 1977-78 provisions is not certain to occur within three years from January 1, 1977, and since MTI's proposed interpretation would require execution of a series of successor agreements including the 1977-78 agreement provisions not changed by mutual agreement or award, MTI is attempting to have the EFFECTIVE DATES provision interpreted so as to continue such 1977-78 provisions in effect for what will become a term in excess of three years. Such an interpretation would result in an illegally long term 11/ and must therefore be avoided.

My interpretation of the 1977-78 agreement as a whole as limiting the impact of the EFFECTIVE DATES provision to that of preserving the status quo until a successor agreement is implemented avoids the illegality noted above 12/ while giving at least some effect to all of the provisions bearing on the duration of the agreement provisions cited in the District's petition. 13/ To be sure, the EFFECTIVE DATES language could conceivably be given greater lawful effect than my interpretation gives it by interpreting it to mean that the 1977-78 provisions not self-terminating continue in effect for a full three years from January 1, 1977 unless there is mutual agreement or an award to the contrary during said three year period. Similarly, however, the portions of the CONFERENCE AND NEGOTIATION, WORKSTOPPAGE and ADOPTION OF BOARD POLICIES provisions cited by the District could be given greater effect by interpreting them to provide for termination of the entire 1977-78 agreement on October 15, 1978. In order to give effect to both, I have adopted an interpretation harmonizing the general concept of continuation reflected in the EFFECTIVE DATES provision with the concept of some end-of-contract-life reflected in the portions of the

---

11/ Section 111.70(3)(a)4, Stats., provides, in pertinent part, as follows: "The term of any collective bargaining agreement shall not exceed three years."

12/ See, City of Wauwatosa (15917) 11/77 wherein the Commission held mandatory language which the Commission interpreted as seeking ". . . to preserve contractual benefits and duties until a new agreement is reached." Id. at 16. However, in my view, such a preservation clause would be enforceable only to the extent that the total term of the status quo preserved does not exceed three years; it would be unenforceable to preserve such status quo beyond a total term of three years.

13/ It is often appropriate, where possible, to infer a term of agreement in order to avoid the conclusion that an agreement is void or voidable at will due to indefiniteness of term. See, e.g., Superior v. Douglas County Telephone Co., 41 Wis. 363, 370-1 (1910); Boeing Airplane Co. v. Aeronautical Industrial District Lodge No. 751, IAM, AFL-CIO, Local No. 1991, ____ F. Supp. ____, 26 LRRM 2324, 2328-29 (WD Wash., 1950); Board of Education of Brookhaven-Comsewogue Union Free School District v. Port Jefferson Station Teachers Assn., 93 LRRM 2967, 2968-70 (NY Sup. Ct., 1976) (dicta); Niagara Wheatfield Administrators Assn. v. Niagara Wheatfield Central School District, No. 112, 98 LRRM 2322, 2344 (NY Ct. App., 1978); Police Protective Association of Casper, Wyoming v. The City of Casper, 97 LRRM 2113, 2119 (Wyo. Sup. Ct., 1978) (dissent). Compare the foregoing with City of Casper, above, 98 LRRM 2113, 2114-5.

CONFERENCE AND NEGOTIATION, WORKSTOPPAGE and ADOPTION OF BOARD POLICIES provisions cited by the District.

The Conclusion of Law and Declaratory Ruling issued herein are not inconsistent with the Oak Creek Schools case 14/ cited by MTI. In that case, the terms of the predecessor agreement continued in effect in the successor agreement as a result of the failure of the District to exercise its option, expressly provided in the predecessor agreement, to serve a timely notice (not less than sixty days prior to the end of the contract period) of intent to terminate the predecessor agreement. The availability of that unilateral termination opportunity, albeit unexercised in that case, avoids the illegality discussed above. For, the nonexercise manifested the municipal employer's assent as of that later time (sixty days prior to the end of the contract period) that the parties would be bound to the provisions of the predecessor as parts of the successor unless they mutually agreed otherwise during the negotiations. While the municipal employer in Oak Creek Schools manifested its waiver of its non-duty to bargain about carrying forward permissive subjects contained in the predecessor agreement into the successor agreement by its choice not to take advantage of its opportunity to give the notice of termination called for in the predecessor, the EFFECTIVE DATES language provided the District herein no such opportunity; therefore, the District cannot be said to have waived its non-duty by not taking advantage of such an opportunity.

The District's admission that the 1975 agreement "continued until modified" is not inconsistent with our conclusion herein that the 1977-78 agreement continues only until a successor agreement is implemented, notwithstanding that the EFFECTIVE DATES provision has remained materially unchanged since 1975. For, in the interim, the changes cited by the District in the CONFERENCE AND NEGOTIATION, WORKSTOPPAGE, and ADOPTION OF BOARD POLICIES provisions were made, resulting in an altered meaning of the agreement as a whole. MTI's arguments that no end-of-contract-obligations concept whatsoever was intended to be conveyed by those changes is unpersuasive. MTI selected the language of the CONFERENCE AND NEGOTIATION changes to refer to "expiration" and did not inform the District that it intended only an admittedly "alternative" meaning of that term -- a meaning which, incidentally, seems somewhat inconsistent with the 1977-78 Agreement II.A.2.b.3. provision that "At such time as the Agreement is reached, the economic benefits agreed upon will be retroactively provided teachers to the beginning of the then current school year", i.e., not effective on and after October 16, 1978. Moreover, the additions to WORKSTOPPAGE and to ADOPTION OF BOARD POLICIES effected in the interim plainly convey the concept of some end to the rights and duties contained in the entire document constituting the 1977-78 agreement.

Finally, while the District's unsuccessful attempt to materially change the EFFECTIVE DATES language in the negotiations leading to the 1977-78 agreement 15/ would have been a highly persuasive basis for re-

---

14/ Above, Note 3.

15/ The District initially proposed that the "Effective Dates and Non-Inclusion" clause be deleted in its entirety. The District on November 9, 1976 altered its position and proposed that the following language be substituted in its place:

> "EFFECTIVE DATES AND NON-INCLUSION
>
> This document entitled Collective Bargaining Agreement (Master Contract) - Madison Board of Education - Madison Teachers, Incorporated, January 1, 1977 - June 30, 1978 hereby encompasses all of the terms relating to wages, hours and conditions of employment between the Board of Education and Madison Teachers, Inc. and this aforesaid document supersedes and shall take precedence over all other agreements (verbal or oral), memoranda of understanding and policies existing between the parties.

jecting a District argument that said provision has no effect, the District has not made that argument. Rather, the District has conceded that the EFFECTIVE DATES language continues the 1977-78 agreement provisions in effect until a successor agreement is reached. That the District sought to avoid such a delayed termination does not necessarily support the conclusion that the parties mutually intended the more sweeping interpretation given the EFFECTIVE DATES clause by MTI. Thus, the result reached herein does not grant the District a concession it was unable to obtain at the bargaining table.

To summarize, MTI's proposed interpretation of the 1977-78 agreement as carrying forward most of its terms as part of a new agreement except as otherwise mutually agreed or awarded by an interest arbitrator must be rejected because it creates a term (or duration) for the provisions affected that is in excess of three years in violation of statute. An alternate interpretation harmonizing the provisions suggesting continuation of agreement with those suggesting a definite end of the life of the contract appears, instead, to be proper. Under that interpretation, the provisions of the 1977-78 agreement technically expired on October 15, 1978, but those not specifically providing otherwise continue in effect until a successor agreement is implemented, whether entirely by mutual agreement or following issuance of a mediation-arbitration award, or until December 31, 1979 (three years after January 1, 1977), whichever is earlier.

It follows from the foregoing contract interpretation that a provision (even if contained in the 1977-78 agreement) must be proposed for inclusion in the successor agreement in order for it ultimately to be contained therein and that the 1977-78 agreement does not preclude the District from objecting to and seeking a declaratory ruling about provisions contained in the 1977-78 agreement which provisions MTI desires to have included in the successor agreement.

While MTI has persuasively argued that its most recently submitted final offer was not intended to contain the portions of the 1977-78 agreement cited in the District's petition I shall assume that, as a consequence of this decision, MTI will propose that those portions of the 1977-78 agreement be included in the successor agreement. 16/ Therefore, I have joined in the order proceeding with consideration of the mandatory/nonmandatory nature of all of the items cited in the District's petition at the time and place noted for further hearing.

Dated at Madison, Wisconsin this 9th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Commissioner

---

15/ (Continued)

> However, the above does not preclude the parties from mutually agreeing to amend this agreement in writing during the term of the Master Contract."

In mediation the parties ultimately agreed to the EFFECTIVE DATES languaqe of the 1977-78 agreement.

16/ That MTI desired the successor agreement to include those provisions is implicit in its position herein and was explicitly indicated at the hearing by its Counsel. (Tr. 47). If the above assumption is incorrect, MTI can so inform the Commission and the petition will, I believe be dismissed as to those items not sought by MTI to be included in the successor agreement.

Opinion of Chairman Slavney

It should be noted that the collective bargaining agreement involved, as well as the May 1977 addendum, were agreed upon and executed by the parties prior to the adoption, and also the effective date, of Section 111.70 (4)(cm)6.a., providing for mediation-arbitration as a process to resolve impasses in collective bargaining. Prior to statutory mediation-arbitration there existed no statutory procedure to "compel" an employe organization and a municipal employer to reach an accord on a collective bargaining agreement. Had the present situation existed prior to mediation-arbitration, MTI's position herein would require the District to maintain and implement a majority of the provisions of the 1977-78 agreement in force until changed by a later agreement. It could have been possible that the parties could not have reached an accord on a new collective bargaining agreement. It would, in my opinion, be contrary to public policy, and to well-established labor relations law, to require the maintenance and implementation of such provisions beyond the point of impasse after a period of good faith bargaining.

Assuming that any of the provisions in the agreement not containing a specific termination date relate, in whole or in part, to permissive subjects of bargaining, the application of the EFFECTIVE DATES provision as urged by MTI, absent a mutual agreement to delete or change said provisions from a successor agreement, would, in effect, result in a conclusion that the party desiring to change same in, or delete same from, a successor agreement has prospectively, and possibly perpetually, waived its statutory right not to proceed to mediation-arbitration on permissive subjects of bargaining.

The effect of MTI's position is that certain provisions of the 1977-78 agreement expired on October 15, 1978, and that the provisions which do not contain such a termination date could be forever perpetuated in all subsequent collective bargaining agreements. Further giving effect to MTI's position results in the fact that the agreement, as a whole, has no termination date. The parties are presently in bargaining in an attempt to reach an accord on a new collective bargaining agreement. MTI argues that the provisions of the 1977-78 agreement, including those which have no termination date, can only be changed by mutual accord or by the award of a mediator-arbitrator. Such an admission flies in the face of the language relied upon by MTI in contending that the District has waived its right to contest the provisions relating to alleged permissive subjects of bargaining.

Further, it should be noted that the 1977-78 agreement provides for a notice of a 45-day commencement of negotiations on a new agreement. If the agreement has no termination date, the question arises as to when this 45-day notice must be given. It is obvious that the parties did not intend that negotiations on provisions which do not contain an October 15, 1978, termination date, in fact, be renegotiated at any time after the 45-day notice for the commencement of negotiations.

Therefore, I conclude that, since the parties are attempting to reach an accord on a new agreement, the District has not, in the 1977-78 agreement, waived its statutory right to seek a declaratory ruling as to whether certain provisions in the 1977-78 agreement, which provisions MTI, apparently at this point in time, would include in the new agreement, relate to permissive or mandatory subjects of bargaining.

However, the pertinent language of the collective bargaining agreement requires the Commission to reach the conclusion that the District is bound to maintain wages, hours and working conditions established in the 1977-78 agreement until such time as a new agreement is implemented following the issuance of the award of the mediator-arbitrator.

In mediation-arbitration, should both parties involved withdraw their final offers, the employe organization, at least in the type of employment

situation involved herein, in my opinion, has the right to engage in a lawful strike. Should such situation develop in the instant mediation-arbitration proceeding, I conclude that the District would not be required to contractually maintain and implement any provision of the 1977-78 collective bargaining agreement after the commencement of the strike.

Dated at Madison, Wisconsin this 9th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman