STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SCHOOL DISTRICT OF DRUMMOND EMPLOYEE'S ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF DRUMMOND, Respondent.	Case XIII No. 24985 MP-1010 Decision No. 17251-B

ORDER ENLARGING AND AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Michael F. Rothstein having, on June 3, 1981, issued Findings of Fact, Conclusions of Law and Order, together with an Accompanying Memorandum, in the above-entitled matter, wherein he concluded that the School District of Drummond, by unilaterally establishing a nepotism policy without bargaining collectively with regard thereto with the School District of Drummond Employees Association, and by failing to renew an employment contract of an employe, previously employed in the bargaining unit represented by the Association, as a result of the implementation of such policy, committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act, and wherein said Examiner ordered the District to take certain affirmative action to remedy such violations; and the District having, on June 22, 1981, timely filed a petition with the Wisconsin Employment Relations Commission, pursuant to Sec. 111.07(5), Wis. Stats., urging the Commission to reverse the Examiner's Conclusions of Law and Order; and the parties having filed briefs in support of, and in opposition to, said petition, the last having been received on August 10, 1981; and the Commission, having reviewed the entire record, the Examiner's decision, the petition for review, and the briefs filed by the parties, being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be enlarged and affirmed, makes and issues the following

ENLARGED FINDINGS OF FACT

1. That the School District of Drummond Employee's Association, hereinafter referred to as the Association, is a labor organization representing municipal employes for purposes of collective bargaining, and has its address at Route 1, Box 111, Hayward, Wisconsin 54843.

2. That the School District of Drummond, hereinafter referred to as the District, has its principal offices at Drummond, Wisconsin 54832; that the District manages and operates a public school system in the Drummond area; and that the Drummond Board of Education is an agent of the District 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 the Association has been, and is, the certified collective bargaining representative of all non-certified staff regularly employed by the District, excluding managerial, supervisory and confidential employes; that school bus drivers are included in said bargaining unit, and their employment is continued from year to year, similar to teachers, by individual employment contracts; that as of January, 1979 Eldon Kravick, Route 2, Cable, Wisconsin, had been employed as a school bus driver for approximately eight years, and that also at the time, his wife, Shirley Marie Kravick, had been an elected School Board member of the District for some ten years; and that in January 1979 the Association and the District commenced negotiations on a collective bargaining agreement, which was to become effective November 1, 1978 and continue in effect through at least June 30, 1980.

4. That at a regular meeting of the District's School Board, which was held on April 16, 1979, the members of said Board, with Mrs. Kravick abstaining, voted to offer contracts of re-employment, for the 1979-1980 school year, to all employes in the bargaining unit represented by the Association, with the exception of Kravick "due to a questionable conflict of interest with a Board member"; that having learned that the Board was contemplating the adoption of a nepotism policy, Barry Delaney, a representative of the Association, on May 9, 1979, directed the following letter to the District:

> It has come to the attention of the School District of Drummond Employee's Association that the Board of Education is considering a nepotism policy. If the Board is considering a nepotism policy which would not allow an individual to work for the District if such individual has a relative who is a member of the Board of Education, then the Board of Education has an obligation to notify the employees' unions of such action and allow them to bargain this change in working conditions. The Board of Education cannot unilaterally change working conditions legally without bargaining such change with the unions involved.
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> If the Board is, in fact, considering this change please inform us before the next bargaining session scheduled for May 21, 1979.

5. That on May 21, 1979, in a bargaining meeting, representatives of the Association and the District, who were engaged in negotiating the collective bargaining agreement, which was to be effective from November 1, 1978 through at least June 30, 1980, reached a tentative accord on said new agreement, subject to final ratification by Association members and the members of the School Board of the District; that during the May 21 meeting, the District advised the Association that it had reached no decision as to the adoption of a nepotism policy; that at a regular meeting of the School Board, held on May 23, 1979, a majority of the Board in attendance, with Mrs. Kravick abstaining, voted to adopt the nepotism policy, which, in material part, set forth the following:

> NOW, THEREFORE, BE IT RESOLVED by the board of the School District of Drummond that it henceforth will not enter into and (sic) employment contract with a spouse or child of any board member if such contract provides for an annual compensation in excess of $5,000.00; that any individual employment contract between the board and a husband, wife or child of a member of the board entered into prior to the date of this resolution and currently in effect shall be performed to the completion of its term and it shall then terminate and be at an end; that the husband, wife or child of any current member of the board, performing services for the district at an annual compensation in excess of $5,000.00 pursuant to an arrangement other than an individual employment contract, shall resign forthwith; and that any person, hereafter performing services for the district at an annual compensation in excess of $5,000.00 pursuant to an arrangement other than an individual employment contract, whose husband, wife, or parent is hereafter elected to serve on the board, shall end such performance of services immediately when his or her husband, wife or parent assumes the office of board member.

6. That on May 29, 1979, in a letter directed to Kravick, over the signature of the District's Administrator, Kathryn J. Prenn, the District enclosed a copy of the above adopted nepotism policy, and a copy of such policy was also sent to Delaney on the same date.

7. That on May 30, 1979, Delaney sent the following letter to Edward Cleary, the President of the School Board:

> It has come to the attention of the School District of Drummond Employee's Association that the Board of Education passed a nepotism policy on May 22, 1979. As per my letter dated May 9, 1979, the Association's position is that the District must bargain this change in working conditions. At the bargaining session on May 21, 1979 the District's

negotiating team told us that they did not yet know what the Board intended to do, as far as a specific nepotism policy.

The Association demands that the Board of Education rescind the newly adopted nepotism policy. If the Board wishes to change working conditions it has a legal obligation to notify the Association and we will meet and negotiate such changes. The Board cannot legally unilaterally change a working condition without offering to bargain. Clearly a nepotism policy and how it affects working conditions is a mandatory subject of bargaining

8. That on May 31, 1979 the membership of the Association ratified the terms of the collective bargaining agreement which was to be retroactive to November 1, 1978 and was to continue to at least June 30, 1979; that said agreement contained among its provisions a three-step grievance procedure, the last step being an appeal to the Board of Education; that however, said procedure did not provide that the Board of Education's action on the grievance was to be final and binding on the parties and/or the grieving employe; and that said agreement also contained the following provision material herein:

ARTICLE VII - DISCIPLINE PROCEDURE

. . .

C. No employee shall be terminated, suspended or reduced in compensation without cause . . .

9. That on June 4, 1979 Prenn directed the following letter to Delaney:

In response to your letter of May 30, Mr. Cleary has asked that I direct a letter to you requesting clarification on the union's position that the recently passed nepotism policy falls within the definition of working conditions.

You are advised the policy was implemented in light of State Statute 946.13, recommendative from the school auditor for the past two years, advice from the Wisconsin Association School Boards and consultation with the school district's attorney.

It is the Board's contention that the entire matter is a policy decision and, as such, falls within the realm of the policymaking authority vested with the Board.

With the implementation of the policy, the decision as to whether Mr. Kravick will receive a contract as bus driver for the 1979-80 school year appears to rest with Mr. and Mrs. Kravick.

10. That, in responding to the above letter, Delaney, on June 11, 1977, by letter addressed to Cleary, indicated that the Association "demands" that the nepotism policy be bargained, and in said regard Delaney requested that the Board set a date therefor; that the Board did not respond to said request, and that on July 16, 1979 at a regular Board meeting the members thereof voted not to offer Kravick, whose compensation during the 1978-1980 school year exceeded $5,000, a contract as a bus driver for the 1979-1980 school year "in accordance with the District's nepotism policy"; and that on July 24, 1979 Delaney directed a letter to Cleary, wherein Delaney reviewed the previous correspondence between the parties regarding the implementation of the nepotism policy, and further stated as follows:

Because the Union clearly informed the District that we wanted to bargain this issue we are of the opinion that the Board's action is clearly illegal. The Board of Education cannot, legally, unilaterally change working conditions without bargaining such changes with the unions involved. We are willing to give the District one last chance to follow the proper procedure. We request a bargaining session regarding this matter on August 6, 1979, at 7:00 p.m. in the Drummond School Library.

If we are not notified by August 2, 1979, that the Board is willing to bargain on this issue we will file a prohibited practice suit with the Wisconsin Employment Relations Commission against the District for failure to bargain and for unilaterally implementing a change in working conditions without bargaining.

11. That also on July 24, 1979, in a letter to Prenn, Delaney "filed" the following grievance:

> Mr. Al Kravick has requested that the School District of Drummond Employees' Association represent him in the matter of the Board's action of denying him a contract as a bus driver for the 1979-80 school year.
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> It is our opinion that Article VII, section C, of the Collective Bargaining Agreement has been violated by the Board when it took action to deny Mr. Kravick employment. For this reason the Association demands that Mr. Kravick be issued a contract comparable to the one he received for the 1978-79 school year.

12. That in a letter addressed to Delaney, dated July 27, 1979, Prenn responded as follows:

> Please consider this letter a response at Step Two of the grievance procedure in the grievance regarding Mr. Kravick.
>
> The Master Agreement citation in your letter of July 24, 1979, appears of little consequence in the matter of Mr. Kravick. Clearly the cause of Mr. Kravick's not receiving a contract for the 1979-80 school year is the fact that Mrs. Kravick is a member of the Drummond Board of Education. You are well aware of the history of the situation and the fact that Mr. Kravick's position as bus driver for the 1979-80 school year would have yielded more that $5,000 and thus, would have violated the district's nepotism policy. You are also aware of the fact that Mr. Kravick was permitted to complete his contract for the 1978-79 school year as afforded by the nepotism policy adopted by the Board in May, 1979.
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> As I stated to you in my letter of June 4, 1979, the final decision as to whether Mr. Kravick would receive a contract for 1979-80 rested with Mr. & Mrs. Kravick. The Kravick's were given considerable time by the Board in which to make that decision. At the July 16th meeting of the Board, Mrs. Kravick informed the Board that she had decided not to resign. Thus, the decision had been made, and the Board passed a motion not to offer Mr. Kravick a contract for the 1979-80 school year in accordance with the District's nepotism policy.
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> In light of the facts cited above, this grievance is denied.

13. That said grievance was appealed to the Board in the final step of the grievance procedure and that on August 23, 1979 the Board, in writing, advised Delaney that at its meeting held August 20, 1979 it had denied the Kravick grievance.

14. That the nepotism policy adopted by the District's Board of Education on May 23, 1979, and continuing in effect at all times material herein, primarily relates to wages, hours and working conditions of employes of the District, and does not primarily relate to the formulation or management of public policy by the District.

15. That at all times material herein the District, its officers and agents have refused, and continue to refuse, to bargain collectively with the representatives of the Association with respect to its decision to implement its nepotism policy and/or with respect to the impact of such decision upon the employes of the District employed in the collective bargaining unit represented by the Association.

Upon the basis of the above and foregoing Enlarged Findings of Fact, the Commission makes and issues the following

ENLARGED CONCLUSIONS OF LAW

1. That inasmuch as the nepotism policy adopted by the Board of the School District of Drummond on May 23, 1979 primarily relates to wages, hours and conditions of employment of employes in its employ, who are represented, for the purposes of collective bargaining by School District of Drummond Employee's Association, the decision to adopt such policy, and the impact of the implementation thereof, were and are mandatory subjects of collective bargaining within the meaning of Secs. 111.70(1)(d), 111.70(2), and 111.70(3)(a)4 of the Municipal Employment Relations Act.

2. That the School District of Drummond, its officers and agents, by the unilateral adoption and implementation of said nepotism policy with respect to the employment status of bus driver Eldon Kravick, without bargaining collectively with regard thereto with the School District of Drummond Employee's Association, after said Association had requested the School District of Drummond to so bargain, has committed, and continues to commit, a prohibited practice within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act.

3. That the School District of Drummond, its officers and agents, by refusing to grant Eldon Kravick a contract of employment, driving a school bus, for the school year 1979-1980, and thereafter, terminating the employment of Eldon Kravick for a reason other than "cause", violated the collective bargaining agreement existing between said District and the School District of Drummond Employee's Association, and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Enlarged Findings of Fact and Enlarged Conclusions of Law, the Commission makes and issues the following

ENLARGED ORDER 1/

IT IS ORDERED that the School District of Drummond, its officers and agents, shall immediately:

1. Cease and desist from:

   a. Refusing to bargain collectively in good faith with the School District of Drummond Employee's Association with respect to its decision to adopt a nepotism policy, as well as the impact thereof, affecting any employes in the collective bargaining unit represented by said Association.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(*Continued on Page 6*)

b. Applying its unilaterally adopted nepotism policy to Eldon Kravick.

c. Terminating any of its employes in the collective bargaining unit represented by the School District of Drummond Employee's Association in violation of any collective bargaining agreement existing between it and said Association.

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

a. Rescind the nepotism policy unilaterally adopted by its School Board members on May 23, 1979 as it affects employes in the collective bargaining unit represented by the Association.

b. Offer Eldon Kravick an employment contract for the school year 1982-1983, as a bus driver, without prejudice to his seniority or other rights or privileges previously enjoyed by him as an active employe, and make Eldon Kravick whole for any loss of pay, or other benefits, he has suffered by reason of its refusal to continue Kravick's employment as a school bus driver for the school year 1979-1980 and thereafter, by paying Eldon Kravick the money he would have normally earned since the commencement of the 1979 school year as a bus driver, up to the date of its unconditional offer of an individual school bus driver's contract to Eldon Kravick, less any earnings that he would have not received, but for the termination of his employment by the District, and less any unemployment compensation, if any, received by Eldon Kravick during said period, as a result of his termination of employment, and in the event Eldon Kravick received such benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations to the extent of the compensation received by Eldon Kravick.

1/ (Continued)

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

c. Notify the School District of Drummond Employees Association, in writing, that it will collectively bargain with said Association with respect to any contemplated decision to adopt a nepotism policy affecting any of the employes in the collective bargaining unit represented by said Association, and at the same time notify said Association, in writing, that it will not terminate any of said employes in violation of any collective bargaining agreement existing between it and said Association.

d. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date hereof, as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli /s/
Gary L. Covelli, Chairman

Morris Slavney /s/
Morris Slavney, Commissioner

Herman Torosian /s/
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER ENLARGING AND AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

On August 6, 1979, 2/ School District of Drummond Employee's Association filed the instant complaint alleging that School District of Drummond had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, MERA, by ignoring the Association's demand to bargain over a nepotism policy and the impact thereof upon the wages, hours and conditions of employment of employes represented by the Association. On September 4 the Association amended its complaint to include an allegation that the District had also committed a prohibited practice under Sec. 111.70(3)(a)5, MERA, by terminating an employe pursuant to said policy contrary to the just cause provision in the parties' 1978-1980 bargaining agreement.

The District's September 17 answer to the foregoing complaint alleged that the nepotism policy was implemented pursuant to Secs. 120.12 and 946.13, Stats., and thus that both the policy and the impact thereof are not mandatory subjects of bargaining. The District further asserted that it had met its obligation to bargain with the Association and requested that the complaint be dismissed.

The Examiner's Decision

Following a September 25 hearing before the Examiner, and briefing schedule which terminated on August 6, 1980, the Examiner issued a decision on June 3, 1981 wherein he found:

(1) that during negotiations on an initial collective bargaining agreement, the Association became aware that the District was considering the adoption of a nepotism policy which would prohibit relatives of members of the Board of Education from being employed by the District;

(2) that both the nepotism policy and the impact thereof are mandatory subjects of bargaining;

(3) that the Association timely demanded bargaining over the policy and the impact thereof;

(4) that the parties reached agreement on their 1978-1980 collective bargaining agreement;

(5) that the District ignored said bargaining demand and proceeded to adopt and implement the nepotism policy set forth in para. 5 of the Enlarged Findings of Fact;

(6) that the District failed to renew Kravick's individual contract of employment pursuant to said nepotism policy;

(7) that the Association unsuccessfully grieved such action as a violation of the "cause" provision in the 1978-1980 agreement, which agreement did not provide for final and binding arbitration of unresolved grievances;

(8) that the District violated Sec. 111.70(3)(a)4, MERA, by refusing to bargain over the implementation of the nepotism policy and the impact thereof; and

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2/ All dates hereinafter noted occurred in 1979, unless otherwise indicated.

(9) that the District violated Sec. 111.70(3)(a)5, Stats., by terminating Kravick pursuant to the nepotism policy.

To remedy the statutory violation the Examiner ordered the District to bargain upon demand over the nepotism policy and the impact thereof, and to reinstate Kravick and make him whole.

The Petition for Review

In its petition, the District initially argues that the Examiner ignored certain pertinent facts which support its claim that the Association waived its right to bargain over the nepotism policy. The District then proceeds to make the following arguments:

> B. Substantial questions of law and administrative policy are raised by the legal conclusions necessary to the examiner's order. The order of the examiner is based on errors of law. The proper result must be dismissed of the complaint as demonstrated in Respondent's briefs previously submitted to the examiner.
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> The major points are as follows:
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> 1. The adoption of the nepotism policy is a subject reserved to management and direction of the School District and not subject to bargaining under Wisconsin Statutes section 111.70(1)(d). In addition to the authorities cited in section One of Respondent's reply brief, Respondent notes that in a recent decision (Decision No. 18512, May 15, 1981) the Commission held once again that implementation of public policy is not a mandatory subject of bargaining.
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> 2. The nepotism policy was not bargained because of the Association's failure to raise the issue. Mr. Delaney knew at least as early as May 9, 1979 that the Board was considering adoption of a nepotism policy yet he failed to bargain that issue at the May 21, 1979 bargaining session. Further, since Mr. Delaney was the representative of the Education Association, which was supporting the policy, Respondent could assume that there was no dispute over the issue.
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> 3. The anti-nepotism resolution constituted cause for not entering a new employment contract with Mr. Kravick.
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> C. The conduct of the hearing and the preparation of the findings of fact, conclusions of law and order involved prejudicial procedural errors.
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> 1. The most glaring procedural error is that the order of the examiner was not filed until June 3, 1981, more than a year and nine months after the last briefs were submitted. The complaint should be dismissed because Wisconsin Statutes section 111.07(4) requires the order to be filed within 60 days and the delay has caused Respondent substantial harm because of the order for back pay for Mr. Kravick and to rehire Mr. Kravick when another driver has been hired to replace him.
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> 2. The examiner did not perform his functions in an impartial manner as required by Wisconsin Statutes section 227.09(6). In particular, he continually protected Mr. Delaney by preventing Respondent from examining Mr. Delaney regarding his relationship with the Education Association (Tr. p.36) arguing for Mr. Delaney regarding his conflicts of interest between the two different unions (Tr. pp. 27-36) and between the union and Mr. Kravick (Tr. pp.49-58), and answering a question for him about bargaining (Tr. pp.61-64).
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> For the reasons set forth above, Respondent demands that the Commission reverse the order of Mr. Rothstein and order the complaint dismissed. In the alternative, if the Commission does not find that reversal is warranted, Respondent requests that the order for back pay be vacated or limited to $5,000.00 per year.

The Association urges that the Commission affirm the Examiner's decision in all respects.

Discussion

Initially the Commission is confronted by the District's assertion that the Examiner erred in concluding that the nepotism policy related to a mandatory subject of bargaining. In his decision the Examiner responded to the District's arguments with the following rationale:

> The initial inquiry to be made is thus whether the nepotism policy adopted by the School Board of Drummond in May of 1979 is a manadatory (sic) subject of bargaining. While there are no WERC decisions directly on point with regard to an employer's duty to bargain over a nepotism policy, the Commission has addressed issues of a similar nature on prior occasions. For example, the Commission has previously held that residency requirements constitute a "condition of employment" since they relate directly to the possible termination of employment, and therefore are a mandatory subject of bargaining. 2/ The nepotism policy involved in the instant matter has the same vital effect on an employe's conditions of employment as the residency requirements found by the Commission to be a mandatory subject of bargaining in the cited cases. The record of the instant case clearly demonstrates that the Association and the Board were fully aware that employe Kravick would be adversely affected by the proposed nepotism policy; this is fairly obvious since it was on the basis of that policy that his employment with the District was terminated. In City of Brookfield v. Wisconsin Employment Relations Commission, 3/ the court stated the following:
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> > While the words "conditions of employment" can be broadly construed to cover many areas, the courts generally restrict interpretation of Statutory language to exclude various kinds of managerial decisions from the scope of the duty to bargain. The conditions of a person's employment have been held to include hours, amount of work expected during work hours, relief periods and safety practices. Another condition would be job security; that is, the question of whether there is to be a job at all. Any change which directly relates to termination of employment has been recognized by the courts as being mandatorily bargainable. Labor Board vs. Adams Dairy, 322 Fed 2nd 553; Labor Board vs. Bachelder, 102 Fed 2nd 274; Labor Board vs. Westinghouse, 120 Fed 2nd 1004. (Emphasis added)
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> Clearly the resolution adopted by Respondent's School Board in the instant matter affects the job security of employes represented by the Complainant Association. The resolution adopted by the Board provides that the Board will not enter into an employment contract with the spouse or child of any member of the Board. It further provides that, if any individual employment contract exists between a member of the Board and a spouse or child of a Board member, that employe shall complete the individual employment contract and then have his/her job terminated. Thus, the policy adopted by the Board clearly affects the conditions of employment of unit employes. Under such circumstances, it is obvious that the Board had an obligation to bargain collectively with the representative of its employes.

2/ Milwaukee Sewerage Commission, Decision No. 11228-A (1972); City of Brookfield, Decision No. 11406-A,B (1973); City of Clintonville, Decision No. 12187-A, 12186-B (1974); City of Madison, Decision No. 15095 (1976).

3/ Case No. 31923, Circuit Court Waukesha County; WERC Decision No. 11406-B (9/73).

The District tries to explain its refusal to bargain on the basis that it was engaged in implementing "the general policy of the State of Wisconsin that public officials have a complete personal disinterest in public contracts" and that the adoption of the resolution was "to prevent violation of Section 946.13, Wisconsin Statutes, a criminal statute, which prohibits private interest in public contracts". Additionally, the Respondent maintains that the adoption of the anti-nepotism resolution was in fulfillment of "obligations imposed upon it to manage the affairs of the District as charged by Section 120.12, Wisconsin Statutes, and such statutory responsibility is one that Respondent cannot delegate to or share with any other person or organization . . ." (answer to complaint).

Such contentions on the part of the District, however, do not satisfy or absolve the District of its statutory obligation to bargain over the nepotism policy with the representative of its employes. This is not to say that the District was prohibited from addressing the conflict of interest issue which was a legitimate concern of the Board. To paraphrase the Commission in the City of Brookfield case, this is not to hold that nepotism limitations cannot be imposed upon employes of a school district; only that where such employes are subject to collective bargaining under MERA, the Act cannot be ignored in imposing such limitations. And as the court has said in Brookfield, 4/ "arguments that the ordinance is a managerial decision, fundamental to the direction of the municipality fails whenever, as in the case at hand, the action taken is in direct impingement of job security". The rationale for the court's decision in Brookfield and the Commission's policy on these matters is well stated in Police Officers Association vs. City of Detroit,

> The enactment of an ordinance, however, despite its validity and compelling purpose, cannot remove the duty to bargain . . . if the subject of the ordinance concerns the . . . conditions of employment of public employes. If the residency ordinance were to be read to remove a mandatory subject of bargaining from the scope of collective bargaining negotiations the ordinance would be in direct conflict with state law . . ." 5/

Finally, it should be noted that even though the municipal employer is required to collectively bargain with the representative of its employes, such a policy does not require that the municipal employer agree to the terms being proposed by the employes' representative:

> . . . if an employe were terminated because he violated the residency requirement, his condition of employment would be most drastically affected. To hold otherwise would be to adopt a most untenable and myopic approach to the reality of labor relations. The Municipal Employment Relations Act does require a Municipal Employer to bargain in good faith over subjects affecting wages, hours and conditions of employment, but it does not require a Municipal Employer to necessarily accede to a Union's proposal relating to those subjects. The Sewerage Commission of the City of Milwaukee, Decision No. 11228-A (10/72).

4/ supra, Case No. 31923.

5/ 85 LRRM 2536, at 2540.

We believe the Examiner's rationale as quoted above adequately and correctly addresses the District's arguments. We would also note that while the District appears to have acted in good faith upon certain legitimate concerns in adopting the policy in question, a review of Secs. 19.59, 120.12 and 946.13, Stats., does

not persuade us that the policy in question is statutorily mandated. 3/ Thus it cannot be persuasively argued that the issue of a nepotism policy has been legislatively removed from the scope of mandatory bargaining under MERA. Thus, we have affirmed the Examiner's conclusion in said regard.

While the District did not specifically take exception to the finding of a duty to bargain the impact of the policy, we find it appropriate to affirm the Examiner's conclusion in that regard as well. We have, however, enlarged his Conclusion of Law and Order to reflect that the District's duty to bargain over both the policy and the impact thereof exists regardless of any present impact upon any current bargaining unit employe. It is the potential for that impact upon unit employes which triggers the duty to bargain. We have also enlarged his Order to include a cease and desist remedy and an explicit requirement that the District rescind the policy in question as applying to employes in the unit represented by the Association.

Turning to the District's contention that the Examiner erred by failing to find a waiver by the Association of any right to bargain, a review of the record clearly supports the Examiner's conclusion. While the Examiner's findings adequately set forth the basis for his conclusion, we have found it appropriate to expand same so that they more completely reflect the sequence of events. That sequence clearly establishes repeated requests by the Association to bargain the policy both before and after its adoption. When told during the May 21 bargaining session that no decision on a policy had been reached, the Association can hardly be faulted for failing to raise the issue again that night, especially when it had already demanded bargaining on the subject through its May 9 letter. Similarly, no waiver results from the Association's decision to ratify the tentative agreement reached on May 22 despite the knowledge, at least on Delaney's part that a nepotism policy had been adopted. It is well established that a waiver of the right to bargain must be clear and unmistakable. 4/ The ratification of the tentative agreement, absent reference to the nepotism policy in the agreement, does not constitute such a waiver. Lastly, the District argues that as Delaney functioned as a representative of the Drummond Education Association, and as the president of said Association had urged the District to adopt a nepotism policy, the Association herein is estopped from complaining about the adoption of such a policy. Even if it were assumed that the president of the Education Association had bound that organization on the issue in question, the fact remains, as the Examiner correctly pointed out during hearing, the Association involved herein is a separate labor organization, representing employes other than teachers, properly seeking to pursue interest which may well be at odds with those of the labor organization representing teachers of the District. Delaney's involvement with both groups hardly constitutes estoppel.

As to the propriety of the Examiner's conclusion that the District violated the parties' agreement in failing to renew Kravick's individual employment contract, pursuant to the nepotism policy, we concur with the Examiner that such action premised upon the policy adopted in the face of a refusal to bargain cannot be considered as falling within the contractually established "cause" standard.

As to the District's contention that the delay in the issuance of the Examiner's decision warrants reversal or at least a limitation upon the District's back pay liability, we would initially note that in Muskego-Norway C.S.J.S.D. No. 9 v. WERB 32 Wis. 2d 478 (1967), the Court found the 60 day period set forth in Sec. 111.07(4), Stats., to be directory, not mandatory. Thus the delay in question, 5/ is not reversible error. Similarly, the impact of the delay upon back pay liability does not form a basis for tolling such liability. As the Court of Appeals

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3/ Indeed as Sec. 19.59, Stats., did not become effective until March 1, 1980, it could hardly have formed the basis for a policy adopted in May, 1979. However, we find it appropriate to consider its applicability herein so that the parties are fully apprised of the then duty to bargain under current statutory provisions.

4/ City of Brookfield, Dec. No. 11406-A, B (9/73); City of Milwaukee, Dec. No. 13495 (4/75); City of Menomonie, Dec. No. 12674-A, B (10/74).

5/ Not entirely attributable to the Examiner. Briefs were filed some 11 months after hearing.

observed in Chicago & N.W.R.R. v. LIRC, 91 Wis. 2d 462, 481, aff'd Wis. Sup. Ct. 98 Wis. 2d 592, when a party voluntarily incurs liability, it is hardly in a position to complain regarding the accrual of such liability during litigation. The Court also noted "If we were to accept appellant's theory, then administrative delay would deprive the employee of that which is rightfully his and absolve the employer of wrongful conduct".

Turning finally to the District's argument regarding the Examiner's conduct during the hearing, we have reviewed the transcript and find no evidence of partiality or improper conduct. Instead, the record reveals efforts by the Examiner to keep the evidence presented during the proceedings within the bounds of relevancy, while still affording the parties an opportunity to present their arguments. The District's argument that the Examiner showed partiality when he issued his decision shortly after an inquiry from the Association on the status of the case hardly warrants a response. Suffice it to say we find both Examiner's conduct and his decision to be entirely proper under Sec. 227, Stats.

In summary we are satisfied that the Examiner's decision should be affirmed with the modifications noted set forth herein.

Dated at Madison, Wisconsin this 15th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli /s/
Gary L. Covelli, Chairman

Morris Slavney /s/
Morris Slavney, Commissioner

Herman Torosian /s/
Herman Torosian, Commissioner