STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WALWORTH COUNTY HANDICAPPED CHILDREN'S EDUCATION BOARD Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and LAKELAND EDUCATION ASSOCIATION	Case III No. 23718 DR(M)-105 Decision No. 17433

Appearances:

Lindner, Honzik, Marsack, Hayman & Walsh, S.C., Attorneys at Law, by Mr. Roger E. Walsh, Esq., appearing on behalf of the Petitioner.

Kelly & Haus, Attorneys at Law, by Mr. Robert Kelly, Esq., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Walworth County Handicapped Children's Education Board having, on November 9, 1978, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to issue a declaratory ruling, pursuant to Section 111.70(4)(b) of the Municipal Employment Relations Act, to determine whether certain proposals contained in the final offer submitted by the Lakeland Education Association, during the course of investigation conducted by the Wisconsin Employment Relations Commission in a mediation-arbitration proceeding involving said parties, are mandatory subjects of bargaining; a hearing was conducted on December 15, 1978, before James D. Lynch, a member of the Commission's staff; the parties filed final briefs on March 6, 1979, and the Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Walworth County Handicapped Children's Education Board, hereinafter referred to as the Board, is a Municipal Employer, located in Elkhorn, Wisconsin.

2. That the Lakeland Education Association, hereinafter referred to as the Association, is a labor organization and is the collective bargaining representative of certain employes in the employ of the Board.

3. That, for some years, the Board and the Association have been parties to the collective bargaining agreements covering wages, hours and working conditions of the employes represented by the Association; the last of such agreements was to expire on June 30, 1978; that on March 10, 1978, notice to open negotiations was served by the Association; that, thereafter, the parties engaged in collective bargaining for the purpose of attempting to reach an accord on a successor agreement; that as of August 21, 1978, the parties had failed to reach such accord; that on that date, the Association filed a petition with the Commission, requesting that the Commission initiate a mediation-arbitration proceeding, pursuant to Section 111.70(4)(cm)6 of the Municipal Employment Relations Act, for the purpose of resolving an alleged impasse existing

between the parties to their bargaining with respect to a successor collective bargaining agreement; during the course of the investigation on the mediation-arbitration petition, the Commission investigator obtained the proposed final offers of the parties; that prior to the close of the investigation and prior to any other action by the Commission, the Board, on November 9, 1978, filed the instant petition for a declaratory ruling, wherein it alleged that certain proposals contained in the Association's final offer related to non-mandatory subjects of bargaining; and that said proposals with the objected to portions underlined are as follows:

a. Long Term Disability (Article VI, Section 1) - The board shall provide, at no cost to the employee, a long term disability insurance program. The program shall provide 2/3 of salary after a sixty (60) day qualifying period, a social security freeze, waiver of premium and a twenty-five percent (25%) minimum benefit. The maximum benefit shall be $1,200 per month. Pregnancy shall be covered as any other illness. The carrier shall be mutually agreed upon. The effective date will be December 1, 1978 or as soon as administratively possible.

b. Dental (Article VI, Section 5) The board shall provide at no cost to the employee, the WEA Insurance Trust Dental Plan. Basic benefits 104 shall be covered at 100% with no deductible. Basic Benefits 5-12 shall be covered at 80% with no deductible. Orthodontia shall be covered at 50%. The effective date for Dental insurance will be December 1, 1978 or as soon thereafter as administratively possible. (Emphasis supplied)

4. That the Association's proposals for long-term disability insurance and dental insurance are for two totally new benefits.

5. That the objected to portions of the Association's proposals with regard to the naming of the insurance carrier which are set forth in Finding 3, above, do not primarily relate to wages, hours or conditions of employment of the employes represented by the Association.

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

CONCLUSION OF LAW

That the objected to portions of the Association's proposals as referred to in Finding 3, above, are permissive, rather than mandatory, subjects of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

On the basis of the foregoing Findings of Fact and Conclusion of Law, the Commission makes and files the following

DECLARATORY RULING

That the Board has no duty to bargain with the Association with respect to the proposals of the Association found herein to involve

permissive subjects of bargaining, and that, therefore, such proposals cannot herein be submitted to mediation-arbitration.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

Walworth County Handicapped Children's Education Board, III, Decision No. 17433

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

In its petition requesting a declaratory ruling, the Board contends that various proposals contained in a final offer submitted by the Association in the mediation-arbitration proceeding relate to non-mandatory subjects of bargaining and, therefore, are improperly included in the Association's final offer.

FACTS:

During the course of negotiations between the Board and the Association, the Association proposed that the Board provide, and make full payment, for two new fringe benefit programs, namely long-term disability insurance and dental insurance. The Association proposed that the dental insurance be provided through the "WEA Insurance Trust Dental Plan" and that the long-term disability insurance be provided through a "mutually agreed upon" carrier. The Board countered with a proposal that the long-term disability insurance be provided through the Wisconsin School Insurance Fund and made no counter-proposal with respect to the dental plan proposed by the Association. These proposals were codified and final offers submitted to the investigator on November 1 and November 2, 1978, during the course of his mediation-arbitration investigation. The Board objected in writing to the Association on November 6, 1978 that the subjects were not mandatory insofar as they relate to the naming of the carrier, and filed the instant petition for declaratory ruling on November 9, 1978.

POSITIONS OF THE PARTIES:

The Board takes the position that the instant proposals are permissive, given the facts of this case. The Board argues that the identity of the insurance carrier is a permissive subject unless there is specific proof that the identity of the carrier "vitally affects" or "primarily relates" to the wages, hours and working conditions of the employes. The Board relies on federal sector precedent in support of its position. These federal sector cases, from both the NLRB and the Federal Courts all involve changes or proposed changes in the identity of the insurance carrier and all but one involve an employer's unilateral change from one insurance carrier to another insurance carrier during the term of a contract. Both the NLRB and the Federal Courts have deemed the identity of an insurance carrier to be a mandatory subject where there has been (1) experience to compare regarding the processing of claims by the carriers and, (2) the Union has been able to show a demonstrable difference in processing and administration of claims which effects wages, hours and conditions of employment.

The Board argues that insofar as this case is concerned with the negotiation of new benefit programs, there is no comparable experience regarding the processing of claims and, thus, the Association has not proved by specific evidence that the identity of the insurance carrier "vitally affects" or "primarily relates" to the wages, hours and working conditions of employes. Finally, the Board argues that during the course of bargaining the Association never raised the issue of administration and processing of claims under the insurance carriers, which might transform the identity of the carrier to a mandatory subject of bargaining.

The Association takes the position that the identity of the insurance carrier of a fringe benefit plan "vitally affects" or "primarily relates" to employes' wages, hours and working conditions. It argues

that as a practical business matter, the identity of an insurance carrier is inextricably bound up with its administration of the policy, because the administration of the policy has an effect on wages, hours and working conditions. Finally, the Association argues that the nature and extent of differences regarding administration of a policy between various insurance carriers cannot be determined by either party absent full knowledge of the identity of the carriers under consideration. The Association contends that a meaningful decision can be made only after a discussion regarding the identity of the insurance carrier and a full analysis of the insurance carrier's methods of processing claims: "In other words, after meaningful discussion at the bargaining table."

DISCUSSION:

In determining whether a proposal constitutes a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, the Commission has adopted the primarily related test - subject matters that are primarily related to wages, hours and conditions of employment are mandatory subjects of bargaining. 1/ The Wisconsin Supreme Court in upholding the Commission's primarily related test stated that the word "primarily" means "fundamentally" and also added the following:

> "It is in this sense of the word that 'primarily' is here used. What is fundamentally or basically or essentially a matter involving 'wages, hours and conditions of employment' is, under the statute, a matter that is required to be bargained." 2/

In City of Brookfield v. WERC, 87 Wis. 2d 819 (1979) the Wisconsin Supreme Court recently reaffirmed the primarily related test and further stated that not every issue that concerns employes is a subject upon which municipal employers are required to bargain, and further that:

> "As stated in sec. 111.70(1)(d) a mandatory subject of bargaining is a matter which affects 'wages, hours and conditions of employment.' The statute also provides for a public sector 'management rights' clause guaranteeing as a management prerogative the exercise of municipal powers and responsibilities in promoting the health, safety and welfare for its citizens. Unless the bargaining topic affects 'wages, hours and conditions of employment' a municipality is not compelled to collectively bargain but may choose to if not expressly prohibited by legislative delegation. Obviously, it is not the intent of the legislature to permit the elasticity of the phrase 'bargaining topics affecting wages, hours and conditions of employment' to be stretched with each and every labor question." at 829.

Thus in determining whether a proposal constitutes a mandatory subject of bargaining there must be a showing that the subject is "primarily"

1/ Oak Creek-Franklin Joint City School District No. 1, 11827-D (9/74), aff'd Dane Co. Cir. Ct. 144 473 (11/75); City of Beloit (Schools), 11831-C (9/74), aff'd Wisconsin Supreme Court, 73 Wis. 2d 43 (6/76).

2/ Beloit Education Association v. WERC, 73 Wis. 2d 43 at 54 (1976). See also, Unified School Dist. No. 1 of Racine County v. WERC, 89 Wis. 2d 28 (1977).

related or "fundamentally," "basically" or "essentially" related to wages, hours or conditions of employment.

The issue as to whether the naming of an insurance carrier is a mandatory subject of bargaining is one of first impression for the Commission. The parties have cited federal case law to support their respective positions. The federal cases have generally involved situations in which the employer, during the term of the collective bargaining agreement, unilaterally changed insurance carriers and this has resulted in changes in insurance benefits. There is "no case law which squarely supports the proposition that the specific insurance carrier for a group health plan is a mandatory subject for bargaining." 3/

The Sixth Circuit in Bastian-Blessing v. NLRB, supra, found that under the facts of that case, the identity of the carrier was a mandatory subject of bargaining. Bastian involved a unilateral change by the employer during the term of the collective bargaining agreement from one insurance carrier (Aetna) to a self-insurance program, which also resulted in a change in benefits. In arriving at this conclusion the Court stated:

> "We have sought to find a way to separate the carrier from the benefits in this case, and we have failed. The peculiar terms of the bargaining contract here, obviously incorporate by reference or necessary implication important sections of the Aetna contract. . . .
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> . . .
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> We emphasize that the conclusion reached herein is governed by the facts of this case and is not to be interpreted as a ruling by this Court that the naming of an insurance carrier for an employee group benefit plan, in the absence of other considerations, is a mandatory subject for bargaining." 82 LRRM at 2692.

In Connecticut Light and Power, supra, the Second Circuit held that the selection of an insurance carrier under the facts therein was not a mandatory subject of bargaining. In that case, during negotiations for a new collective bargaining agreement, the union sought to change the carrier. The company absolutely refused to bargain the selection of the carrier and maintained it had the right to unilaterally choose the carrier, but the company did bargain with respect to coverage, benefits and administration. The Court concluded "that the Company, having negotiated about that matter, was free to choose any carrier that would satisfy the Company's agreement with the Union." 4/

The Seventh Circuit recently dealt with the issue of the naming of the insurance carrier in Keystone Steel and Wire v. NLRB, supra. Keystone resulted from a unilateral change by the employer during the term of the negotiated agreement in the identity of the administrator of two benefit programs. Specifically, the company there changed the administrator of the dental benefits program from Aetna Life and Casualty Company to Metropolitan Life Co., and the administrator of the hospital, medical and surgical benefits program from Blue Cross to Metropolitan Life Co.

3/ Bastian-Blessing v. NLRB, 474 F 2d 49, 82 LRRM 2689 (6th Cir. 1973). Also see: Connecticut Light and Power Co. v. NLRB, 476 F 2d 1079, 82 LRRM 3121 (2d Cir. 1973); Keystone Steel and Wire v. NLRB, ____ F. 2d ____, No. 78-2215 decided September 12, 1979.

4/ Connecticut, supra, at 3123.

The NLRB concluded that since there was no evidence presented regarding the administration of the dental plan under Aetna or Metropolitan and no evidence presented regarding whether there was any significant difference between the carriers, the Board's general counsel failed to prove that the identity of the carrier with respect to the dental program had any effect on the wages, hours and working conditions, and therefore, the employer did not violate its duty to bargain by changing the administrator of the dental program. With respect to the changing of the administrator for health care benefits, the NLRB found the difference in the administration of plans had a "substantial and significant" effect on the terms and conditions of employment and therefore, found the identity of the carrier was a mandatory subject for bargaining. As a remedy the NLRB ordered Keystone to cease and desist from making unilateral changes in the identity of the administrator of the hospital, medical and surgical benefits without reaching agreement with the union and if the union requested, reinstatement of Blue Cross would be ordered.

On appeal the Seventh Circuit found in Keystone that in view of the differences between the Blue Cross and Metropolitan programs, as identified by the NLRB, among which included differences in the schedule of customary allowances for various operations and the elimination of a labor consultant to assist with claim problems, the change in administrators brought about changes which have a "material and significant" 5/ effect or impact upon the terms and conditions of employment, and therefore the change became a mandatory subject of bargaining. Although the Court agreed with the NLRB's finding that bargaining was required, the Court refused to enforce the NLRB's order requiring Keystone to dismiss Metropolitan and reinstate Blue Cross upon the union's request. The Court found the NLRB's remedy to "be heavy handed, disruptive and overly broad." The case was remanded to the Board for further consideration and "adoption of an appropriate and more limited remedy in keeping with its opinion."

In determining whether the identity of the insurance carrier or the administrator/processor of "benefit program" is a mandatory subject of bargaining the Commission relies in part upon the analysis of the federal courts. In particular, we find that the Seventh Circuit's test of "material or significant" effect or impact upon a term or condition of employment is essentially the same as our "primarily related" test. Therefore, unless there is a specific showing that the identity of the insurance carrier (administrator/processor) "primarily relates" or has a "significant effect on wages, hours and working conditions of the employes, the identity of the carrier is a permissive subject of bargaining.

Applying this standard to the facts herein, we find that the naming of the carrier as proposed by the Association by specifically naming a carrier for dental or by proposing "shall be mutually agreed upon" with respect to long-term disability, are permissive subjects. In this case, the proposals concern two new benefit programs which prevent a showing that the benefits proposed by the Association cannot be provided by other insurance carriers which the Board might select. The Association's evidence only dealt with how the Wisconsin Education Association Insurance Trust currently administers its programs, but failed to show that the

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5/ The Court acknowledged that the United States Supreme Court had recently made clear that the "vitally affects" test was inapplicable except where third party interests are implicated (Ford Motor Co. v. NLRB ____US____, 101 LRRM 2222, 2227 (1979)) and utilized the "case by case approach and the legal test of material or significant effect or impact upon a term or condition of employment." Keystone, supra, note 3.

benefits requested by the Association could not be satisfactorily provided by other insurance carriers.

Where it can be shown by specific evidence that the identity of the insurance carrier or administrator/processor has a "significant effect" or "primarily relates" to wages, hours and working conditions of the employes, we would find the identity to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 19th day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner