STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. TURTLE LAKE SCHOOL DISTRICT Respondent.	Case XVI No. 26917 MP-1162 Decision No. 18198-A

Appearances:

Mr. Robert West and Mr. Alan Manson, Executive Directors, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, 409 South Barstow Street, Eau Claire, Wisconsin 54701, by Mr. Stephen L. Weld, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on October 14, 1980 alleging that Respondent had violated section 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act, herein MERA. The Commission on October 29, 1980 appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 11.07(5) Stats. Respondent filed an answer on November 17, 1980. Hearing on the matter was held in Barron, Wisconsin on December 10, 1980. At the hearing Complainant amended its complaint to include an allegation that by its conduct referred to in its original complaint, Respondent had violated Section 111.70(3)(a)5 Stats. Post hearing briefs were submitted by Complainant and Respondent. The Examiner having considered the evidence and arguments presented by the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant, Northwest United Educators, is a labor organization within the meaning of Section 111.70(1)j Stats. Northwest United Educators represents the instructional staff employes at several school districts in collective bargaining with the respective school boards. Among the bargaining units which NUE represents is the instructional staff employed by the Respondent, School District of Turtle Lake. Respondent has voluntarily recognized Northwest United Educators-Turtle Lake (NUE-TL) as the exclusive bargaining representative of said employes. In this regard, NUE has been involved in prohibited practice complaint cases, mediation-arbitration proceedings and a proceeding for declaratory ruling in which the names NUE and NUE-TL have been used interchangeably by the instant parties.

2. Respondent, School District of Turtle Lake, is a public school district and a municipal employer having its principle offices at Turtle Lake, Wisconsin. Mr. Douglas Henderickson is employed by the Respondent in the capacity of District Administrator.

3. Since at least 1974 the Complainant has represented the teachers employed in the collective bargaining unit voluntarily recognized by the Respondent in collective bargaining and contract administration. Since 1974 the parties have negotiated contracts varying in duration from one to two years. The parties were unable to reach a voluntary agreement on a one year contract for the 1979-80 school year. Pursuant to section 111.70(4)(cm)(6)b stats., the parties submitted their final offers to an impartial arbitrator for resolution of various issues concerning the 1979-80 contract. In said "mediation-arbitration" proceeding both parties submitted a final offer that covered the 1979-80 school year only.

4. During the course of the mediation phase of the "mediation-arbitration" proceeding the Respondent, on about March 28, 1980 authorized the mediator-arbitrator to offer the Complainant, on Respondent's behalf, a two year contract "package" which provided economic items covering the 1979-80 and 1980-81 school years. The Complainant rejected Respondent's proposal for a two year agreement. Unable to resolve their differences, the parties elected to have the arbitrator select the final offer of one of the parties. Said award was dated August 11, 1980.

5. Sometime during July and early August, 1980, Respondent, by its District Administrator, Mr. Hendrickson, made an offer of wages and fringe benefits for the 1980-81 school year to five teacher applicants. Said offers were consistent with Respondent's offer made during the mediation phase of the mediation-arbitration process in March 1980 but rejected by Complainant at that time. Hendrickson told said applicants that the wages and fringe benefits were subject to modification pending further negotiations with the Union. Hendrickson told the applicants that said offer would probably not be lower. In calculating the wages of one applicant, Ms. Chojnacki, Hendrickson stated that the Union would not like the way in which he figured her salary. Said teachers accepted Hendrickson's salary and fringe benefit offer.

6. At the commencement of the 1980-81 school year, Respondent did not grant any of the returning teachers an experience increment. Said teachers received the same pay as during the 1979-80 school year. The parties' 1979-80 agreement did not contain a provision which preserved the terms of the agreement during the hiatus period after the expiration of the contract.

7. Complainant and Respondent commenced negotiations for the 1980-81 school year in July, 1980. Preliminary matters were discussed prior to receipt of the "interest" Arbitration Award dated August 11, 1980 covering the terms of the 1979-80 school year. A clarification of said award was required and same was issued on or about September 11, 1980. At the time Respondent granted wage increases for the 1980-81 school year to the new teachers, the parties were not at an impasse in their negotiations for the 1980-81 school year. Indeed, in October 1980, Respondent made an offer to the Complainant which contained less money on the salary schedule than had previously been offered but contained more money in the fringe benefit area.

8. At the commencement of the 1978-79 school year, Complainant and Respondent had not reached an agreement on a successor collective bargaining agreement. At that time Respondent initially offerred new teachers wages and fringe benefits based upon its last offer to Complainant but did not offer same to the returning teachers. Complainant objected and Respondent recinded its action by agreeing to pay all teachers wages and fringe benefits based upon the parties' prior collective bargaining agreement. At the commencement of the 1979-80 school year, the parties again had not reached agreement on a successor collective bargaining agreement, but Respondent paid new teachers based upon the terms of the prior agreement.

9. Respondent contends that it offered new teachers for the 1980-81 school year a wage increase in order to compete with other districts since, at that time, the last salary schedule in effect was that which was contained in the 1978-79 contract.

10. Complainant timely filed a grievance over Respondent's failure to grant returning teachers the experience incretment. The School Board denied said grievance. The parties' contract did not contain a final and binding arbitration provision.

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

CONCLUSIONS OF LAW

1. That NUE is a labor organization which represents, among others, the instant bargaining unit, and therefore Complainant is a proper party to initiate the instant complaint.

2. That the parties' grievance procedure does not provide for final and binding arbitration, and therefore Complainant possesses the right to seek relief for the alleged contractual violation as specified in Section 111.70(3)(a)5 stats.

3. That Respondent's conduct of unilaterally implementing a wage offer to new teachers but not to returning teachers constitutes individual bargaining. Respondent has therefore refused to bargain collectively with the majority's representative in violation of Section 111.70(3)(a)4 Stats. and derivatively, violates Section 111.70(3)(a)1 Stats.

4. Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that Respondent's conduct referred to in paragraph 3 above constitutes a violation of Section 111.70(3)(a)3 or 5 Stats. and therefore Respondent has not committed a violation of either one of those statutory provisions.

Upon the basis of the above Findings of Fact and Conclusions of Law, the undersigned makes and files the following

ORDER

IT IS ORDERED that Respondent, School District of Turtle Lake, its officers and agents shall immediately

1. Cease and desist from refusing to bargain collectively with Complainant labor organization by unilaterally granting pay increases prior to the impasse to some but not all of its employes in said bargaining unit.

2. Take the following affirmative action that the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a) Notify all of its employes in the bargaining unit represented by the Complainant by posting in conspicious places on its premises where notices to such employes are usually posted, copies of the notice attached hereto and marked Appendix "A". Such copies shall bear the signature of the President of the School Board and shall remain posted for thirty (30) days after the initial posting. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other materials.

b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of service of this Order as to what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that all remaining portions of the complaint shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 25th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

APPENDIX "A"

NOTICE TO ALL INSTRUCTIONAL STAFF EMPLOYES
REPRESENTED BY NORTHWEST UNITED EDUCATORS

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employes that:

WE WILL NOT refuse to bargain collectively with Northwest United Educators by unilaterally granting pay increases to only certain employes in this bargaining unit prior to impasse.

WE WILL refrain from all other forms of interference with the right of employes to bargain collectively through representatives of their own choosing pursuant to Section 111.70(2) of the Municipal Employment Relations Act.

Dated this day of , 1981.

By_____
President, School District of
Turtle Lake

THIS NOTICE SHALL REMAIN POSTED FOR A PERIOD OF THIRTY (30) DAYS AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

STATEMENT OF THE COMPLAINT AND ANSWER

In its complaint and amended complaint, Complainant alleged that Respondent committed prohibited practices within the meaning of Section 111.70(3)(a)1,3,4 and 5 Stats. by 1) failing to pay returning teachers the experience increment consistent with the parties expired agreement; and 2) by unilaterally implementing a wage offer to new teachers but not to returning teachers. As a remedy Complainant seeks 1) a cease and desist order along with complianance notices, 2) an order requiring Respondent to make whole all employes for loses suffered by Respondent's conduct, and 3) an order requiring Respondent to reimburse Complainant for its attorneys' fees and other costs occasioned by this action.

In response, Respondent answers said complaint by alleging first, that Complainant has no standing to bring this complaint; and secondly, denies that Respondent's conduct herein violated any provision of the Municipal Employment Relations Act.

STANDING OF COMPLAINANT N.U.E.

Position of the Parties:

Respondent contends that Northwest United Educators and Northwest United Educators-Turtle Lake are not one and the same entity. The parties' collective bargaining agreement Article II Recognition Clause, refers to Northwest United Educators-Turtle Lake as the exclusive bargaining representative for teachers in the Turtle Lake bargaining unit. Although Complainant, by its representatives Mr. Manson and Mr. West, were present at the instant hearing each refused to answer questions concerning NUE's internal political and financial arrangements. Respondent made an offer of proof to the effect that members of NUE include members of all bargaining units represented by NUE whereas members of NUE-TL are limited to members of NUE who are employed by the Turtle Lake School District. Moreover, Respondent believes that the Board of Directors of NUE is composed of one member of each of the bargaining units represented by NUE. Since NUE and NUE-TL are separate and distinct entities, Respondent argues that NUE has no standing to bring this complaint.

NUE, on the other hand, argues that the issue of NUE's representative status was litigated in 1974. In Turtle Lake Consolidated School District No. 11929-A, Examiner Fleischli concluded that NUE was the successor to the previous bargaining representative. Thereafter, the Respondent has referred to NUE and NUE-TL interchangably for several years without any substantive difference. Respondent has voluntarily recognized NUE-TL as the bargaining representative. Said title, NUE-TL, defines the bargaining unit at the School District of Turtle Lake.

DISCUSSION OF STANDING ISSUE

At the instant hearing, the Examiner dismissed Respondent's motion to dismiss the complaint. Respondent contended that NUE lacked standing to bring this action. The undersigned believes that Respondent is placing "form over substance" on this issue. Standing has been defined by the United States Supreme Court as follows:

> Standing concerns the question of whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the Statute . . . in question. 1/

1/ Association of Data Processing Service Oranganizations, Inc. vs. Camp 397 US 150 (1970) as cited in City of Madison 15079-D (1/78)

Section 111.70(2)(c) Stats. provides:

> Upon the filing with the Commission by any party in interest of a complaint in writing. . . .(emphases added)

Wisconsin Administrative Code Section ERB 12.02(1) also refers to "any party in interest" having the right to file a complaint. Moreover, ERB 1.01 states that the Commission may waive any requirement of the rules unless a party shows prejudice.

It is clear to the undersigned that NUE in its capacity as a labor organization which represents teachers employed at the School District of Turtle Lake is a "party in interest" in the instant dispute within the meaning of Section 111.07(2)a Stats. 2/ Moreover, Exhibits 1 through 7 demonstrate that the parties have used the titles NUE and NUE-TL interchangably and without meaningful difference. No prejudice to Respondent was demonstrated by allowing NUE to bring this action. Even taking Respondent's offer of proof as accepted fact does not support a conclusion that NUE lacks standing to bring this case. This is so because both NUE and NUE-TL are a "party in interest" within the meaning of the applicable law.

ALLEGED VIOLATIONS OF SECTIONS 111.70(3)(a)1,3,4, AND 5

Positions of the Parties:

Respondent contends that it offerred "conditional" wages to the new employes subject to modification by the master agreement. Said individual contracts contained the required language. Since the Respondent's offer of wages for the 1980-81 school year was rejected by Complainant during mediation in March 1980 before the Mediator-Arbitrator, Respondent fullfilled its duty to bargain prior to implementing its last offer.

With respect to its failure to award experience increments to holdover staff, Respondent relies on Menasha Jt. School District 16589-A in which the Examiner upheld the District on similar facts.

Complainant argues that the Respondent did not bargain to impasse over wages for the 1980-81 school year. Moreover, even if Respondent had bargained to a legitimate impasse, it would have been obligated to implement its offer for all the employes rather than selectively as was done. Referring to Respondent's failure to grant experience increments during the contract hiatus, Complainant's brief states that the Menasha appeal should determine whether or not a violation of the collective bargaining agreement occurred.

DISCUSSION

REFUSAL TO BARGAIN

In its brief, Respondent cites Racine Unified School District No. 1 11313 4/74 wherein the Commission stated the principle of law that:

> . . .if parties bargain to impasse over a mandatory subject of bargaining, the municipal employer can unilaterally implement same."

This principle is applicable to the instant dispute, but it does not answer all of the issues raised by this case. For instance, it is for the Examiner to determine the factual issue of whether a bona fide impasse had been reached when Respondent unilaterally implemented its previous wage offer to new teachers. Further, the Examiner must determine whether the manner in which Respondent implemented its offer was consistent with MERA.

2/ See also City of Menasha 13283-A (2/77); Weyauwega School District 14373-B (6/77); Berlin Area School District 16325-A (11/78).

Looking to whether the Respondent bargained to impasse over wages for the 1980-81 school year prior to granting a wage rate to the new teachers, the Examiner finds no persuasive evidence to conclude that an impasse existed. The parties were at an impasse over the wages for the 1979-80 school year but they had not commenced serious negotiations over wages for the 1980-81 school year. The fact that Complainant rejected Respondent's offer concerning the 1980-81 salary schedule during the mediation-arbitration of the 1979-80 contract cannot be said to create an impasse for the 1980-81 school year. Even though the parties did not agree on a two year agreement during the mediation phase before the Mediator-Arbitrator, the fact remains that the parties submitted final offers concerning a one year agreement for the 1979-80 school year. There was obviously ample reason to believe that future meetings, after receipt of the award for the 1979-80 school year, might lead to a voluntary agreement for the 1980-81 school year. Indeed, Respondent made an offer as late as October 1980 concerning salary and fringe benefit items. Hence, Respondent made a unilateral change in the status quo without first bargaining to impasse.

Moreover, even if an impasse had occurred in this case, Respondent's conduct still amounted to a refusal to bargain with the majority representative. This is so because an employer may implement its last offer after an impasse is reached so long as it is uniformily applied to all of the bargaining unit employes. The essence of collective bargaining requires that an employer may not pick and choose which employes will receive said unilateral wage increase. Here, the employer failed to meet this requirement.

Respondent relies upon the fact that the teachers were informed that the wage rates were contigent upon negotiations with the Union and the individual contracts so stated. Respondent also refers to Section 111.70(3)(a)(4) Stats. which states as follows:

> ". . . such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such contracts contain express language providing that the contract is subject to amendment by a subsequent bargaining agreement. . . ."

In the context of the instant dispute, reliance upon the above statutory provision is misplaced. Said provision merely permits an employer to sign up new employes under individual contracts so long as the wages offered are consistent with the status quo, and so long as the Union is not precluded from further bargaining. Said provision does not permit an employer to selectively implement its last wage offer to only part of the bargaining unit. Agreeing with Complainant, if an impasse exists, the new wage rates must be given to all of the employes in the bargaining unit. To hold otherwise would allow the employer to "by-pass" the bargaining representative by engaging in individual bargaining. Such a holding would be totally contradictory to established principles of labor law and labor policy as developed under the Municipal Employment Relations Act.

Therefore, by unilaterally granting a wage rate to some but not all of the bargaining unit employes, Respondent has refused to bargain collectively with the majority representative in violation of Section 111.70(3)(a)4 Stats. Such conduct also constitutes a derivative violation of Section 111.70(3)(a)1 Stats.

In defense of its conduct, Respondent alleged that it granted said wage rates to new teachers in order to compete with other districts. The instant record lacks credible evidence of economic necessity. But, even assuming the existence of an economic necessity, Respondent was required to give notice to the Union of its intended change in wages in response to said emergency and bargain to impasse

at that time. 3/ This, Respondent failed to do.

Turning, then, to the alleged violation of Section 111.70(3)(a)3 Stats., the undersigned finds the record unsupportive of this allegation.

ALLEGED VIOLATION OF CONTRACT IN VIOLATION OF SECTION 111.70(3)(a)5.

The Commission will exercise its jurisdiction under Section 111.70(3)(a)5 Stats. to determine whether a collective bargaining agreement has been breached once exhaustion of the grievance procedure has occurred, unless the parties have agreed to final and binding arbitration. Here, the parties' contract does not provide for final and binding arbitration. Jurisdiction is therefore appropriate.

The Commission's affirmance of Examiner Greco in Menasha Jt. School District 16589-B 9/81 is dispositive of this issue. The Respondent is not obligated in this case to pay the experience increment to returning teachers after expiration of the agreement.

REMEDY

Complainant seeks a cease and desist order, a make whole award with interest, attorneys fees and posting of notices.

As to attorney fees and interest, the Commission, in Madison Metropolitan School District 16471-D (5/81) enunciated its policy with respect thereto. In cases such as this, the Commission has determined that attorney fees and interest are inappropriate.

Consequently, the undersigned has determined that the order to cease and desist along with posting of the appropriate notice best effectuates the purposes of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 25th day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

3/ Glazers Wholesale Drug Company 211 NLRB 1063 (1974) enf's 523 F 2d 1053 (5th Cir. 1975).