



STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION,

Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT,

Respondent.

Case LVIII

No. 28256 MP-1230

Decision No. 18810-A

Appearances:

Schwartz, Weber & Tofte, Attorneys at Law, by Ms. Mary F. Wyant and by Mr. Robert K. Weber on the brief, 704 Park Avenue, Racine, Wisconsin 54303 for Complainant.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Jack D. Walker, P.O. Box 1664, Madison, Wisconsin 53701 for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on June 23, 1981, alleging that the above-named Respondent had committed certain prohibited practices within the meaning of Sections 111.70(3)(a)4 and 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner in Racine, Wisconsin on September 17, 1981; and the parties having filed briefs on March 15, 1982; and the Examiner, having considered all of the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order. 1/

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- 1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

FINDINGS OF FACT

1. That Racine Education Association, hereinafter the Association, is the certified exclusive collective bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the Racine Unified School District and is a labor organization having its principal offices located at 701 Grand Avenue, Racine, Wisconsin.

2. That the Racine Unified School District, hereinafter the District, is a municipal employer having its principal offices located at 2220 Northwestern Avenue, Racine, Wisconsin.

3. That at all times material hereto the Association and the District have been parties to a collective bargaining agreement governing the wages, hours and conditions of employment of the aforesaid employees of the District; that the bargaining agreement at Article VII contains a grievance procedure provision which provides for final and binding arbitration; and that the bargaining agreement also contains the following provisions:

ARTICLE III

TEACHER RIGHTS

. . .

6. The Association shall be informed in writing of any contemplated change in policy affecting working conditions in order that the Association may present its views to the Board.

7. The Superintendent of Schools or his/her designee will meet with representatives of the Association to hear them express the Association's views before the Board makes a change in policy that has a substantial effect on the wages, hours, or conditions of employment of teachers.

. . .

ARTICLE XIII

INSURANCE AND RETIREMENT

. . .

3.a. The Board shall make available a Life Insurance Group Plan. Teachers shall pay the premium called for by the plan. The Board shall add an amount equal to 32% of the teacher contribution toward this plan.

b. The Board shall provide a plan comparable to that in effect in February, 1977, during the term of this Agreement.

. . .

4. That the parties' 1972-1974 and 1974-1976 bargaining agreements at Article XIII, Section 3, contained the following provision on life insurance:

"The Wisconsin State Life Insurance Group Plan is available to teachers. The Board shall add an amount equal to 32 percent of teacher contributions towards this plan. (The amount of life insurance received under this plan is the next thousand ollars (sic) 2/ higher than the previous calendar year earnings. Employees under 30 contribute 20 cents per thousand dollars monthly. Employees under 40 contribute 40 cents per thousand dollars monthly, while employees over 40 contribute 60 cents per thousand dollars each month.) Teachers are

2/ The word "ollars" was changed to "dollars" in the 1974-1976 agreement.

automatically included in this plan after six months employment, unless they sign a waiver requesting noncoverage. Reinstatement once a waiver is signed is available to those under 50 years of age on request of the insurance company and subject to approval by the company.";

and that in the parties' 1977-1979 agreement the life insurance provision was amended to read the same as it appears in the parties' current agreement.

5. That the parties' 1972-1974 bargaining agreement at Article III, Section 7, contained language identical to that of Article III, Section 6, of the parties' current agreement; that the 1972-1974 agreement did not contain the provision that is Article III, Section 7 of the current agreement; that the parties' 1974-1976 bargaining agreement at Article III, Section 7 and 8, contained language identical to that of Article III, Sections 6 and 7, respectively, in the parties' 1977-1979 and current agreements.

6. That sometime in the fall of 1976 the District sought bids on the District's group life insurance; that the District accepted the bid of Crown Life Insurance Company, hereinafter Crown, with the Crown plan taking effect on January 1, 1977 and remaining in effect until June 1, 1981; that Crown informed the District that it was increasing its premium rates effective February 1, 1981; that on February 16, 1981 the District's Board of Education, hereinafter the Board, accepted the recommendation of its Finance/Property Committee and authorized the District to seek bids on the group life insurance for the District's employees; that thereafter a bid request was sent to various life insurance companies with bids due by April 7, 1981; that both the District's 1976 bid request and its 1981 bid request for group life insurance contained bid specifications for a group plan covering all of the eligible employees in the District and not limited only to those employees in the bargaining unit represented by the Association; that on April 20, 1981 the Board accepted the recommendation of its Finance/Property Committee and passed a resolution authorizing the District to accept the bid of Confederation Life Insurance Company, hereinafter Confederation Life, for group life insurance coverage for its employees; that coverage under the Confederation Life plan went into effect on June 1, 1981 and on September 14, 1981 the District received a copy of the policy tendered by Confederation Life; that at least since the group life insurance plan under Crown went into effect in 1977 the same group life insurance policy that covered employees represented by the Association also covered administrators and other eligible employees in the District and that this remains true under the Confederation Life plan.

7. That as a matter of practice the Association receives copies of the agendas for all Board meetings, such agendas being identical to those received by Board members, as well as copies of the minutes of Board meetings; 3/ that pursuant to said practice the Association received copies of the agendas and minutes of the February 16, 1981 and April 20, 1981 Board meetings; that the District never sent the Association copies of the bid specifications for the group life insurance plan or the policy from Confederation Life, nor did the Association request copies of such; and that other than the agendas and minutes for the February 16, 1981 and April 10, 1981 Board meetings the Association received no other communications from the District regarding the change of the group life insurance carrier.

8. That the minutes of the February 16, 1981 and April 20, 1981 Board meetings contain the following mention of the subject of group life insurance:

"February 16, 1981 - 10

. . .

FINANCE/PROPERTY COMMITTEE REPORT

11 February 1981

Your Committee recommends that:

3/ The minutes of the Board meetings also contain the reports of the Board's Finance/Property Committee.

- . . .
4. the District seek competitive bids on group life insurance for the employees of the District.

. . .

February 16, 1981 - 11

. . .

Prior to the action on Item 5, (sic) your Committee received information that Crown Life Insurance Company was increasing the rates from 1¢ per \$1,000 to 2¢ per \$1,000, effective February 1, 1981. Said increase was being charged due to the large amount of claims which have occurred, primarily during the 1980 calendar year.

. . .

February 16, 1981 - 13

. . .

On motion of Mr. Kumm and second by Mrs. Vicha, it was unanimously passed that Item 4 be approved.

. . .";

"April 20, 1981 - 14

. . .

FINANCE/PROPERTY COMMITTEE REPORT

18 April 1981

Your Committee recommends that:

- . . .
2. the group life insurance for 1981-82 and 1982-83 be purchased from the Confederation Life Insurance Company at a rate of \$.217 per month per thousand.

. . .

April 20, 1981 - 17

. . .

Mr. Kumm moved, Mr. Frank seconded, that Item 2 be approved.
Ayes - 8. Noes - 0.

. . ."

10. That James Ennis, the Executive Director of the Association, appeared at the April 20, 1981 meeting of the Board's Committee-of-the-Whole, which meeting preceded the regular Board meeting on that date; and that Ennis made the following statement at the April 20, 1982 Committee-of-the-Whole meeting:

"I would like to know in the switch of the insurance companies why the -- if the switch to Confederation Life Insurance Co. is a switch that covers the employees that the REA represents; I would like to know what the switch means. It seems to be our life insurance -- we pay for it, we have a right to be consulted and you don't have a right to ignore us."

11. That pursuant to receiving the agendas for the February 16, 1981 and April 20, 1981 Board meetings, as well as the minutes of those Board meetings, the Association was on notice that the Board was considering a change of the carrier

providing the District's group life insurance plan; that from the time the Association had notice that the Board was considering a change in the group life insurance carrier until its filing of the complaint in this matter the Association did not demand to bargain, nor did the Board offer to bargain, regarding the change in the group life insurance carrier or any impact such a change might have had on the wages, hours or working conditions of the employees in the bargaining unit represented by the Association; and that at no time has the Association, or any of the employees in the bargaining unit represented by the Association, filed a grievance under the parties' bargaining agreement regarding the change in the group life insurance carrier or any impact such a change might have had.

12. That the Confederation's group life insurance policy which went into effect on June 1, 1981 contains the following provisions:

GENERAL PROVISIONS

POLICY YEAR

The period from 12:01 A.M. on the Effective Date until 12:01 on the 1st Policy Renewal Date shall be deemed to be the 1st Policy Year. Any subsequent Policy Year shall be from 12:01 A.M. on the previous Renewal Date to 12:01 A.M. on the following Renewal Date. During any Policy Year, Policy Months shall be computed from the beginning of such Policy Year.

RENEWAL DATE

The Renewal Date is June 1st.

(Page 2)

. . .

THE CONTRACT (17)

This Policy, the application of the Policyholder (a copy of which is attached), the individual applications of the employees and any document in support of, or altering the information or effect of any such application shall constitute the entire contract between the parties.

(Page 12)

. . .

PREMIUMS (19)

. . .

At each Renewal Date on or after June 1, 1983, a gross monthly premium per \$1000. of Life Benefit will be calculated by multiplying each employee's amount of Life Benefit by his rate as set out in the Monthly Premium Rate Clause. The total premium for all employees will be increased by any Surcharge in effect and then divided by the total amount of Life Benefit in force.

(Page 13)

. . .

TERMINATION OF POLICY

If the Policy holder gives written notice to Confederation Life that this Policy is to be terminated the Policy will terminate on the date specified or the date written notice is received, whichever is later.

. . .

(Page 15).

13. That pursuant to the terms of the Confederation group life insurance policy said policy represents the contract between Confederation Life and the District; that said policy is renewable each June 1st and by its terms may be terminated by the District at any time upon written notice to Confederation Life; and that by being signatory to said policy the District has not precluded the

Association from bargaining over the subject of life insurance for the parties' successor agreement.

That upon the basis of the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That since the parties' 1979-1982 collective bargaining agreement contains a provision for final and binding arbitration, which the Complainant Association has failed to exhaust, the Commission will not assert its jurisdiction to determine whether the Respondent District breached said agreement in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act as alleged in the Association's complaint.

2. That since the Association never demanded to bargain with the District concerning the matter of changing the group life insurance carrier after the Association was put on notice that the District was contemplating such a change, and subsequently, that such a change was made, the Association waived any right it may have had under MERA to bargain with the District regarding said change, and therefore, the District did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

3. That by being signatory to the insurance contract between the District and Confederation Life the District has not precluded the Association from bargaining over the subject of life insurance for the parties' successor agreement and has not committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law the Examiner makes the following

ORDER

It is ordered that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 27th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY



David E. Shaw, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Association filed the instant complaint with the Commission on June 23, 1981, wherein it has alleged that the District unilaterally changed the Life Insurance Group Plan during the term of the parties' collective bargaining without bargaining the change and that said change resulted in increased teacher contribution costs. The Association also alleged in its complaint that the District had covered employe units other than the unit represented by the Association under the new group life insurance plan. The Association contends that by doing so the District committed prohibited practices by breaching the collective bargaining agreement and failing to bargain about the impact of such a change. In its post-hearing brief the Association also alleges that the duration of the insurance contract between the District and Confedeation extends beyond the term of the parties' collective bargaining agreement, thereby effectively precluding the Association from bargaining over life insurance when the parties' agreement expires.

In response, the District contends that pursuant to previous Commission decisions it had no duty to bargain regarding the change in the identity of the group life insurance carrier, said subject having been determined to be a permissive subject of bargaining. 4/ The District also contends that it had no duty to bargain over the increase in premium rates since under the parties' bargaining agreement the employes warrant to pay the full premium, and therefore, any mid-term increases must be borne by the employes. The District also alleges that, in any event, the change in carrier actually resulted in a cost savings to the employes. The District also contends that, even assuming arguendo that there was an impact resulting from the change in carrier, Article III, Sections 6 and 7 of the parties' agreement constitutes a waiver of the Association's right to bargain. Moreover, the Association never requested to bargain over impact. Finally, the District requests that the complaint in this matter, regarding alleged violations of the contract, be dismissed for failure to exhaust the parties' contractual grievance arbitration procedures.

BREACH OF CONTRACT

The Association contends that by changing the carrier the District changed the existing life insurance benefits in violation of the parties' collective bargaining agreement.

The District argues that since the parties' bargaining agreement contains a grievance procedure culminating in final and binding arbitration, and no grievance has been filed concerning the change in carrier, the Commission should not exercise its jurisdiction to decide the breach of contract claim.

The Commission's long-standing policy regarding breach of contract allegations has been not to assert its jurisdiction where the complainant has failed to exhaust the parties' contractual grievance and arbitration procedures. 5/ The exceptions to this policy are where the union has been frustrated in its efforts to utilize the grievance and arbitration procedures 6/ or where the parties have mutually waived the arbitration procedure. 7/ Since no attempt was made to exhaust the parties' contractual grievance and arbitration procedures, and as not any of the foregoing exceptions to the Commission's policy are present in this case, the Examiner will not assert the Commission's jurisdiction to determine whether the District has breached the bargaining agreement.

4/ Citing Walworth County Handicapped Childrens Ed. Board (17433) 11/79 and School District of the Menominee Area (16724-B) 1/81.

5/ Joint School District No. 1, City of Green Bay, Et al., (16753-A,B) 12/79; Board of School Directors of Milwaukee (15825-B,C) 6/79; Oostburg Joint School District (11196-A,B) 12/72.

6/ Kenosha Unified School District (13302-B) 1/76.

7/ City of South Milwaukee (13175-B, 13176-B) 1/76.

REFUSAL TO BARGAIN

The Association contends that the District violated Section 111.70(3)(a)4, Stats., by refusing to bargain the impact of its decision to change the group life insurance carrier and the alleged change in the make up of the group of employees covered by the group life insurance.

The District does not object to the Commission asserting its jurisdiction to determine whether the District violated Section 111.70(3)(a)4. Rather, the District contends that it had no duty to bargain over the change in carrier, since there was no impact, and even if the Examiner should find that there was an impact the Association waived its right to bargain by its inaction.

In determining whether the identity of an insurance carrier is a mandatory or permissive subject of bargaining the Commission has held that

"Where it can be shown by specific evidence that the identity of the insurance carrier has a "significant effect" or "primarily relates" to wages, hours and working conditions, the identity of the carrier becomes a mandatory subject of bargaining, absent such evidence the determination of the carrier is a permissive subject of bargaining." 8/

However, before proceeding to determine whether the change in carrier resulted in any significant impact or effect on the employees' wages, hours or conditions of employment, it will first be determined whether the Association waived whatever rights it might have had to bargain over the change in carrier. If, as the District alleges, the Association has effectively waived its rights in that regard it will be unnecessary to decide the question of whether the change in the identity of the carrier is a mandatory or permissive subject of bargaining under the circumstances in this case.

The record indicates that the Association received the agendas and the minutes of the February 16, 1981 and April 20, 1981 Board meetings at which the topic of the change in the group life insurance carrier was discussed. The Association's Executive Director, James Ennis, was present at the April 20 meeting and addressed the Board's Committee of the Whole regarding the proposed change in carrier. It was at the April 20 meeting that the Board voted to approve the change in the group life insurance carrier from Crown to Confederation Life. The Confederation group life insurance policy went into effect on June 1, 1981 and the instant complaint was filed by the Association on June 23, 1981. It was stipulated to at the hearing that the Association did not demand to bargain, nor did the District offer to bargain, with regard to the change in the carrier.

Having been made aware of the impending change in the group life insurance carrier, as well as the Board's subsequent approval of the change, it was incumbent upon the Association to make a timely demand to bargain regarding the change. 9/ As noted, such a demand was never made. Therefore, by its inaction the Association waived whatever right it might have had under MERA to bargain with the District regarding the change in the group life insurance carrier.

Even assuming arguendo that the Association had not waived its right to bargain, the record does not support the Association's contention that the District unilaterally changed the group of employees covered by group life insurance plan. Rather, the record indicates that at least since 1977 the District's group life insurance plan as covered all eligible District employees, including employees in bargaining units other than the unit represented by the Association. Therefore, there was no change to be bargained.

In its post-hearing brief the Association contends that the insurance policy/contract between the District and Confederation Life extends beyond the life of the parties' current bargaining agreement, thereby effectively precluding the Association from bargaining over life insurance for their successor agreement.

8/ School District of the Menomonie Area (16724-B) 1/81; Walworth County Handicapped Children's Ed. Bd. (17433) 11/79.

9/ City of Appleton (18451-A,B) 9/81; City of Appleton (17034-D) 5/80; Joint School District No. 1, City of Green Bay, Et al. (16753-B) 6/81.

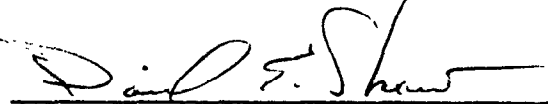
The issue of the effect of the duration of the insurance policy/contract between the District and Confederation Life was not raised in either the complaint or at the hearing. Normally, it would be unfair to a party to allow the opposing party to belatedly raise an issue and thereby preclude the other party from responding. However, since there are sufficient facts in the record to resolve the issue raised by the Association, and the parties' bargaining agreement will expire shortly, in the interest of efficiency the Examiner will proceed on the issue.

The Examiner first notes that there is no basis in the record for the Association's contention that the duration of the District's group life insurance policy/contract with Confederation Life exceeds the term of the parties' bargaining agreement. The policy provides that it is renewable each June 1st. Therefore, the policy came up for renewal on June 1, 1982, i.e., almost three months before the parties' current bargaining agreement expires. Secondly, by its terms the Confederation Life insurance policy/contract is terminable by the District at any time upon written notice of termination from the District to Confederation Life. Hence, there is no basis for concluding that the duration of the insurance contract between the District and Confederation Life precludes the Association from bargaining with the District over the subject of life insurance for their successor agreement. 10/

Based upon the foregoing the Examiner has dismissed the complaint.

Dated at Madison, Wisconsin this 27th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
David E. Shaw, Examiner

10/ Since it has been found that there is no factual basis for the Association's contention in this regard, it is not necessary to determine whether an insurance contract between an employer and insurance company in any way affects a union's right to bargain over the insurance covered by that contract during the life of that contract.