

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, :
 :
Complainant, :
 :
vs. :
 :
RACINE UNIFIED SCHOOL DISTRICT, :
 :
Respondent. :
 :

Case LXI
No. 29137 MP-1298
Decision No. 19357-D

ORDER REVISING EXAMINER'S FINDINGS OF FACT AND
MODIFYING CONCLUSION OF LAW AND AFFIRMING
EXAMINER'S ORDER

Examiner Christopher Honeyman having, on November 2, 1982, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter, and on November 5, 1982 said Examiner having modified his Conclusions of Law in the matter, wherein the Examiner concluded that the Racine Unified School District had not refused to bargain collectively with the Racine Education Association, with respect to the impact of the District's decision to reduce the hours of work of Exceptional Education Aides, on the wages, hours and working conditions of teachers in the employ of the District, since provisions relating to the impact of said decision were included in the 1979-1982 collective bargaining agreement existing between the parties; and thereafter neither party having filed a petition pursuant to Sec. 111.07(5), Wis. Stats., as provided in Sec. 111.70(4)(a) of the Municipal Employment Relations Act, indicating any dissatisfaction with the findings or order of the Examiner; and that, however, the Commission, having reviewed the decision of the Examiner, on November 26, 1982, 1/ on its own motion issued an Order setting aside the Examiner's Findings of Fact, Conclusions of Law and Order, for the purposes of review by the Commission as set forth in the above cited statutory provisions; and thereafter, on January 7, 1983, Counsel for the Respondent District having filed a statement in support of the Examiner's decision; and the Commission having reviewed the pleadings filed in the matter, the entire record, and the briefs of Counsel, the decision and modified decision of the Examiner, the statement filed by Counsel for Respondent District in support of the Examiner's decision, being satisfied that the Examiner's Findings of Fact and Modified Conclusions of Law should be revised, but that the Examiner's Order should be affirmed, makes and issues the following

REVISED FINDINGS OF FACT

1. That Racine Education Association, herein referred to as the Association, is a labor organization having its offices at 701 Grand Avenue, Racine Wisconsin; and that, at all times material herein, James Ennis has been, and is, the Executive Director of the Association and its agent.

2. That Racine Unified School District, herein referred to as the District, is a municipal employer which operates a kindergarten through 12th grade school district in and about Racine, Wisconsin, and has its principal offices at 2220 Northwestern Avenue, Racine, Wisconsin; and that, at all times material herein, Richard C. Nelson and Delbert Fritchen were, respectively, the District's Superintendent and Assistant Superintendent for Personnel Services, and its agents.

1/ November 25, 1982 was a legal holiday and thus the twenty day review period established by Sec. 111.07(5), Stats., was extended to November 26, 1982 by operation of Sec. 990.001(4)(b), Stats.

3. That, at all times material herein, the Association has been, and is, the certified collective bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District, excluding on-call substitute teachers, interns, supervisors, administrators, and all other employees of the District; and that, however, at no time material herein has the Association been the collective bargaining representative of Teacher Aides, including Exceptional Education Aides in the employ of the District.

4. That, at all times material herein, the Association and the District have been parties to a collective bargaining agreement covering the wages, hours and working conditions of the teachers in the employ of the District, which agreement, by its terms was in effect from August 24, 1979 through at least August 24, 1982; and that during the course of said agreement, and on January 5, 1982, Fitcher, by letter, advised Ennis as follows:

I am writing to inform you that the District is facing a shortfall in anticipated State Aid for Exceptional Education programs for the current fiscal year.

In reviewing financial problems caused by this anticipated shortfall there is a strong possibility that selected Exceptional Education aides will have their work week reduced by approximately seven and one-half hours per week (one (1) day) starting with the second semester of the current school year.

I would be happy to meet with you to hear any concerns the Racine Education Association might have concerning the impact of such change should this decision be implemented.

5. That on or about January 20, 1982, Ennis wrote to Superintendent Nelson as follows:

Please take notice that the Racine Education Association hereby demands immediate impact bargaining over the wages, safety, working conditions, hours and other terms of employment effected by the announced policy of January 18, 1982 to reduce the number of hours of each teacher (sic) involved in exceptional education duties in the Racine Unified School District.

6. That on January 22, 1982, Fitcher replied to Ennis, by letter, in these words:

The District notified you on January 5, 1982, that it was considering possible reduction in hours for Exceptional Education aides because of a shortfall in anticipated state aid for Exceptional Education Programs. Your letter, received January 20, 1982, demands immediate impact bargaining of wages, safety, working conditions, hours and other terms of employment.

At your request, a meeting has been set for Monday, January 25, 1982, at 10:00 a.m. in the IMC Preview Room to meet with the Racine Education Association concerning this matter.

7. That on January 25, 1982 representatives of the Association and the District met in a meeting, for the purposes set forth in the correspondence between the parties, as noted above; that at said meeting Fitcher advised that the District had not as of that date made its final decision as to the reduction of the work of the Aides, and that the District had planned such reduction in order to reduce District expenditures because of budgetary problems; that during said meeting Ennis proposed methods of saving funds other than by reducing the hours of the Aides; that, however, during the course of said meeting, neither Ennis, nor any other representative of the Association attending said meeting, made any proposals relating to the planned reduction of hours worked by the Aides as said reduction would impact on the wages, hours and working conditions of the teachers represented by the Association.

8. That, by letter dated February 2, 1982, Fitcher formally advised Ennis that "full-time exceptional education teacher aides in the District will be reduced one hour per day effective Wednesday, February 3, 1982"; and that at no

time, either prior to February 2, 1982 or thereafter, up to and including the date of the hearing herein before the Examiner, March 3 and 19, 1982, has any representative of the Association submitted any proposals to any representative of the District relating to the impact of the reduction of the hours of the Aides on the wages, hours and working conditions of the teachers in the employ of the District.

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

REVISED MODIFIED CONCLUSION OF LAW

1. That, where in a complaint proceeding, an Examiner of the Wisconsin Employment Relations Commission modifies any portion of the Findings of Fact, Conclusions of Law and Order, and Memorandum Accompanying same issued by said Examiner, the Commission, as a body, pursuant to Secs. 111.07(5) and (6), Wis. Stats., may on its own motion set aside, modify or change any portion of the Examiner's decision, within twenty (20) days from the date that such modification by the Examiner is mailed to the parties in interest, and therefore the Commission, as a body, timely issued its Order Setting Aside the Examiner's Findings of Fact, Conclusions of Law and Order previously issued herein.

2. That, inasmuch as the Racine Education Association has, at no time material herein, submitted any specific proposal to the Racine Unified School District relating to the impact on wages, hours and working conditions of teachers in the employ of the District, resulting from the reduction in the hours of work of Exceptional Education Aides in the employ of the District, the Racine Unified School District has not violated its duty to bargain collectively with the Racine Education Association, within the meaning of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, with regard to said impact.

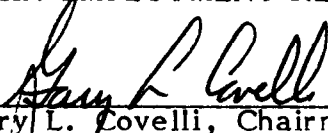
Upon the basis of the above and foregoing Revised Findings of Fact and Revised Modified Conclusion of Law, the Commission makes and issues the following


ORDER 2/

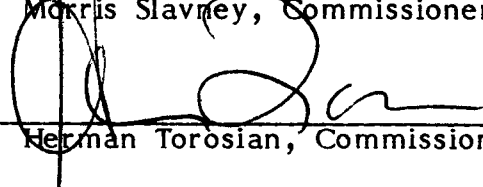
1. That the complaint filed in the instant matter be, and the same hereby is, dismissed in its entirety.

Given under our hands and seal at the City of
Madison, Wisconsin this 27th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

2/ 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
(Continued on page 4)

1/ (Continued)

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.

(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.

MEMORANDUM ACCOMPANYING
ORDER REVISING EXAMINER'S FINDINGS OF FACT AND
MODIFYING CONCLUSION OF LAW AND AFFIRMING
EXAMINER'S ORDER

The Pleadings

In its complaint initiating the instant proceeding the Association alleged that the District failed to bargain collectively with the Association in violation of Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, by implementing, unilaterally, a change in hours and working conditions of employees (teachers) represented by the Association, without first bargaining the impact of such change.

The Association sought an order requiring the District to cease and desist "from committing the above described practice," requesting the Commission issue an "immediate injunction prohibiting the implementation of the announced policy until a decision is reached on the management nature of the bargaining, and until negotiations have been completed", and an "increase of 7 and 1/2 hours pay in salary for each individual teacher . . . for the increase in work load resulting from such unilateral change."

In its answer the District denied the substantive allegations in the complaint, and asserted various affirmative defenses. Prior to hearing before the Examiner, the District also filed a motion to dismiss the complaint. The Examiner did not specifically rule on said motion prior to the issuance of his decision.

The Positions of the Parties

The Examiner succinctly set forth the position of the parties in the memorandum accompanying his decision. Basically, the Association contends that the District had the duty to bargain on the impact of its decision at any time upon request, that such a request was made, that the District refused to bargain with respect to the impact of said decision, and that the existing collective bargaining agreement contained no waiver of the impact bargaining involved. The District contends that the agreement does contain provisions relating to impact bargaining, that the Association did not establish any impact on which bargaining was required, and, further, that the Association made no timely request to bargain the impact "since the decision to reduce aides' hours was made," nor has the District refused to bargain said impact.

The Examiner's Decision

The Examiner dismissed the complaint, concluding, in his Order Modifying his original Conclusions of Law, that the District had no duty to bargain with respect to the impact of its decision to reduce the hours of the Aides on wages, hours and working conditions of the teacher's represented by the Association, "since provisions relating to the impact of such decisions are included in the 1979-1982 collective bargaining agreement between the parties . . ."

Commission Review on its Own Motion

Neither party sought review of the Examiner's decision pursuant to Sec. 111.07(5), Wis. Stats. However said statutory provision permits the Commission, on its own motion, to set aside, reverse, or modify an Examiner's decision. Upon review of the Examiner's decision, the pleadings and the record, the Commission timely issued an Order setting aside the decision of the Examiner for the purpose of review and disposition thereof by the Commission.

Position of District with Respect to Commission Review

On January 7, 1983 Counsel for the District filed a statement with respect to the Commission's Order to review of the Examiner's decision. Therein, the District contended that "the dismissal of the complaint by the Examiner was supported by a preponderance of credible evidence, was correct as a matter of law, and that any review of said decision by the Commission is limited to a selection of the theory of dismissal."

The District contends that the Commission is without jurisdiction to review the Examiner's Findings of Fact, Order, or Memorandum, since such were issued as part of the Examiner's original decision on November 2, 1982, and the Commission's Order to review was not filed within 20 days of that date as required in Sec. 111.07(5), Wis. Stats. The District argues that the Commission is limited only to review the Examiner's Modified Conclusions of Law, issued on November 5, 1982, and further, that the Commission is limited to a selection of the theory on which the complaint is to be dismissed. The latter contention is based upon the following response of the Commission's General Counsel to an inquiry of Counsel for the District regarding the Commission's Order to review, wherein Commission's General Counsel stated as follows:

. . . the Commission believes that the Examiner may have erred when he premised his decision upon the waiver theory set forth in his Memorandum and did not dispose of the waiver-by-inaction theory you raised during the hearing . . .

Discussion

With respect to the contention that since the Examiner only modified his Conclusions of Law, the Commission's review can only apply to that portion of the Examiner's decision, Counsel's argument is indeed novel. He cites no authority or precedent in support thereof. We disagree. A review and resultant amendment of any particular portion of a decision may require a modification of other portions of the decision. Therefore, we conclude that when the Examiner modified his Conclusions of Law, the time period for review of any portion of the Examiner's decision is to be calculated from the date of the issuance of such modification.

The Commission has revised the Examiner's Findings of Fact so as (1) to include the fact that the Association does not represent the Teacher Aides in the employ of the District, and (2) to reflect the material statements made and facts which occurred and did not occur during the January 25, 1982, meeting of the representatives of the Association and the District (all in Revised Finding of Fact 7), and a Finding of Fact 8, to reflect facts material to the Revised Conclusion of Law. We have not included in the Revised Findings of Fact any facts relating to contractual waiver.

As indicated in the Findings of Fact, the District, by letter, on January 5, 1982 advised the Association that "there is a strong possibility that selected Exceptional Education aides will have their work week reduced", and that the District was willing to meet with representatives of the Association "to hear any concerns the Racine Education Association might have concerning the impact of such change should the decision be implemented". The Association, while not the bargaining representative of the Aides, was and is the exclusive collective bargaining representative of the teachers, and the District anticipated that the reduction in the hours worked by the Aides might have an impact on the teachers who were working with said Aides with Exceptional Education students.

On January 20, 1982 the Association, by its Executive Director Ennis, by letter, requested that the District immediately begin "impact bargaining" in the matter. Representatives of the parties met on January 25, 1982, however, at no time during said meeting or thereafter has the Association made any proposal relating to the impact of the District's decision to reduce the hours of the Aides, or to its implementation of such reduction in hours.

While during the course of the hearing the parties adduced evidence with regard to past bargaining history, as to what the existing collective bargaining agreement contains with respect to "assaults on teachers", we conclude that such evidence is immaterial to our conclusion herein since the Association made no specific proposals to the District. The Association alleged that the District refused to bargain on the impact of its decision to reduce the hours of the Aides. However, at no time up to the hearing herein did the Association ever submit a proposal with respect to said impact, over which the District could bargain. Thus, a refusal to bargain cannot be found. In reaching this conclusion we have

rejected the Examiner's conclusion that a recent Commission decision 3/ involving these same parties "essentially controls this case" because a finding of waiver must be determined on a case by case basis. Given this rejection we have revised the Examiner's Modified Conclusion of Law to reflect the proper theory for disposition of this case.

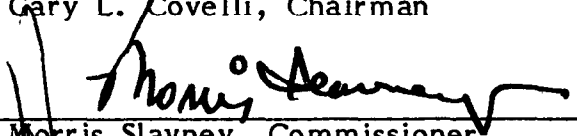
Dated at Madison, Wisconsin this 27th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

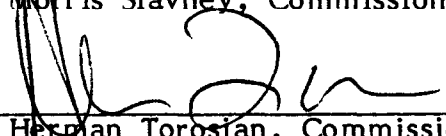
By



Gary L. Covelli, Chairman



Morris Slavney, Commissioner



Herman Torosian, Commissioner

3/ Racine Unified School District (18848-A) 6/82.