STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of NICOLET HIGH SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and NICOLET EDUCATION ASSOCIATION	Case XVIII No. 28694 DR(M)-207 Decision No. 19386

Appearances:

Foley and Lardner, Attorneys at Law, by Mr. Herbert P. Wiedemann, First Wisconsin Center, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Nicolet High School District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of Nicolet Education Association.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

During the course of an investigation in a mediation-arbitration proceeding initiated by the Nicolet Education Association alleging that said Association and the Nicolet High School District were at an impasse in their collective bargaining with respect to wages, hours and working conditions to be included in a collective bargaining agreement between the parties to become effective for at least the 1981-1982 school year which would cover the District's regular full-time and regular part-time teachers, the District, on October 9, 1981, filed a petition requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling, pursuant to Sec. 111.70(4)(b), Stats., determining whether a layoff proposal submitted by the Association during the course of collective bargaining related to a mandatory subject of bargaining; and the Association having, on November 16, 1981, filed a Motion, and a statement in support thereof, requesting the Commission to dismiss the District's petition; and hearing in the matter having been conducted on December 21, 1981 at Madison, Wisconsin, Chairman Gary L. Covelli and Commissioner Morris Slavney being present; and the parties having filed post hearing briefs, the last of which was received January 13, 1982; and the Commission, having considered the entire record and arguments of Counsel, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Nicolet High School District, hereinafter referred to as the District, is a municipal employer, having its offices at 6701 North Jean Nicolet Road, Glendale, Wisconsin 53217; and that the District maintains and operates a

successive collective bargaining agreements setting forth the wages, hours and working conditions of the teachers represented by the Association; that the last of such executed agreements, by its terms, was to expire on August 31, 1981; and that said agreement contained the following provision:

> ARTICLE XVII - Discipline Procedure
>
> . . .
>
> The District agrees that no teacher will be non-renewed except for incompetency, inefficiency, reduction in staff or other good and sufficient reason. If the teacher disagrees with the Board's determination, the matter may be processed through the grievance and arbitration procedure of this Agreement. In the event of arbitration regarding non-renewal or in event a non-renewal decision is challenged through any type of litigation or administrative proceeding the judgment of the Board shall not be reversed or modified unless it is determined to be arbitrary, capricious, discriminatory or in bad faith.

3. That the parties, during June, 1981, engaged in negotiations in an attempt to reach an accord on a new agreement to succeed the agreement which was to expire on August 31, 1981; that on June 21, 1981 the Association filed a petition requesting the Wisconsin Employment Relations Commission to initiate a mediation-arbitration proceeding to resolve the impasse alleged by the Association to have arisen between it and the District in said negotiations; that during the course of the investigation conducted by a Commission staff member the parties disclosed that among the matters at impasse were proposals of both parties relating to the layoff of bargaining unit personnel; that in the latter regard the District proposed that the provision contained in Article XVII of the expired collective bargaining agreement be contained in the new agreement; that during the course of the mediation-arbitration investigation the Association submitted a detailed layoff proposal which contained language relating to the "timing and frequency" of layoffs of bargaining unit personnel; that, following the District's objection to bargaining with respect to said portions of the Association's proposals relating to the "timing and frequency" of layoffs, on the claim that said portions of the proposal related to the management of the District, the Association modified its layoff proposal by eliminating the objected to language pertaining to the "timing and frequency" of layoffs, and in that regard sent a letter, over the signature of its Executive Director, dated September 14, 1981, to the District as follows:

> Your bargaining team has objected to the Association's proposals regarding layoff notice procedures, the time frame in which such notices must occur, and the timing and frequency of layoffs implemented by the Board, as permissive subjects of bargaining. Accordingly, the Association has withdrawn such proposals, in order to expedite a settlement of our collective bargaining agreement.
>
> This letter will expressly inform you, however, that since we have not negotiated any layoff notice procedures, notice time frames, or provisions governing the timing and frequency of layoffs, it is the Association's position that Section 118.22, Wis. Stats., applies to any layoffs which the Board may implement.
>
> Neither the Association nor any individual employes have waived or in any way limited their rights to enforcement of individual teaching contrats entered into pursuant to Sections 118.21 and 118.22. Nothing in the collective bargaining agreement or the conduct of the parties constitutes a "modification" of the individual teaching contracts so as to render Section 118.22 inapplicable to layoffs, or to render those contracts breachable for purposes of layoff during their terms.

Accordingly, should the District attempt to totally or partially lay off any teacher after entering into a new one-year individual employment contract with the teacher, where such a layoff is to take place during the term of that individual employment contract, the Association will view the layoff as a breach of the individual contract and will take action in court for contract damages.

The Association's position is supported by the Wisconsin Supreme Court's decisions in Faust v. Laydsmith (sic) Hawkins School Systems, 88 Wis. 2d 525 (S. Ct. 1979), and Mack v. Whitnall School District, 92 Wis. 2d 476 (S. Ct. 1979).

4. That as a result of the foregoing letter and its expressed intent, the District, on October 12, 1981, filed the instant petition for declaratory ruling alleging that the proposal in question is a permissive subject of bargaining because said proposal links the timing and frequency of layoffs to Sec. 118.22, Stats.; that in its statement in support of said petition, the District stated that even though the Association's proposed layoff language contained no expressed restraints on timing and frequency of layoffs, the linking of the timing and frequency of layoffs to Sec. 118.22, Stats., was accomplished with the separate letter of intent and verbal statements of intent to the same effect; that but for the Association's letter of September 14, 1981, and other verbal statements of intent to the same effect, the District has no objections to the language contained in the Association's proposal.

5. That subsequent to the sending of the letter set forth in Finding of Fact 3, the Association has repeatedly informed the District that the layoff proposal does not seek to link the timing and frequency of layoffs to Sec. 118.22, Stats., and that during hearing on the instant petition, the Association, by Counsel, withdrew the letter set forth in Finding of Fact 3.

6. That the Association's proposal, as fully set forth in the Accompanying Memorandum, regarding the procedure for the layoff and recall of teachers in the employ of the District, does not link the timing and frequency of teacher layoffs to the statutory non-renewal procedure contained in Sec., 118.22, Stats., and that, therefore, said proposal primarily relates to wages, hours and working conditions of teachers in the employ of the District, and not to the management of the District.

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

CONCLUSION OF LAW

That the proposal of the Nicolet Education Association relating to the procedure for the layoff and recall of teachers in the employ of the Nicolet High School District, which proposal is fully set forth in the Attached Memorandum, relates to a mandatory subject of bargaining within the meaning of Secs. 111.70(1)(d) and 111.70(3)(a)4, Stats.

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

DECLARATORY RULING

1. That Nicolet High School District has the duty to bargain with Nicolet Education Association concerning the latter's proposal, fully set forth in the Attached Memorandum, relating to the procedure for the layoff and recall of

teachers in the employ of Nicolet High School District, and, further, that said proposal may be properly included in any final offer submitted by Nicolet Education Association in any mediation-arbitration proceeding initiated pursuant to Sec. 111.70(4)(cm), Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

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

Background

During the course of bargaining on a collective bargaining agreement to succeed the agreement which was to expire on August 31, 1981, the Association proposed the inclusion of a provision relating to layoff and recall of employes in the bargaining unit. In past collective bargaining agreements there were no provisions specifically relating to layoffs and recall. However, as indicated in the Findings of Fact, teachers in the bargaining unit could be non-renewed for "incompetency, reduction in staff or other good and sufficient reason". Following the filing of a petition requesting the Commission to initiate mediation-arbitration to resolve an alleged impasse in the bargaining, and during the course of the Commission investigation in the latter matter, the Association proposed to include a provision in a collective bargaining agreement relating to layoff and recall. After the District raised objection to the initial and revised proposals, on the basis that said proposals contained provisions relating to the timing and frequency of layoffs, which related to permissive, rather than to mandatory subjects of bargaining, the Association modified its proposal to read as follows: 1/

NEW ARTICLE - LAYOFF AND RECALL PROCEDURE

Section 1. Standard

In the event the Board determines to reduce the number of employe positions or the number of hours in any position ~~for the forthcoming school year,~~ the provisions set forth in this Article shall apply.

Section 2 Notices and Timelines

Prior to the end of each school year, the Board and the Association shall develop a mutually-agreeable seniority list, which shall rank all employes, including both active employes and employes on full or partial layoff, according to their length of service in the District, as determined under Section 3, Step 3 below. Such list shall also state the teaching assignments, if any, presently held by such employes, and the areas in which such employes are licensed.

Prior to implementing any layoff(s), the Board shall notify the Association in writing of the position(s) which it is planning to reduce. Thereafter, upon Association request, the Board shall meet with the Association to bargain concerning the impact of any reduction(s).

The Board shall provide preliminary notice in writing to the employe(s) it has selected for reduction under Section 3, Step 2 and 3 below, and shall provide those employes an opportunity for a conference with the Board prior to implementing any layoff(s).

1/ The phrase "for the forthcoming school year" was deleted by the Association from Section 1 during the hearing herein.

After the private conference, the Board shall provide final notice in writing to those employes who have been selected for full or partial layoff.

The Board shall simultaneously provide the Association with copies of all preliminary and final notices it sends to employes under this Section.

Section 3. Selection for Reduction

In the implementation of staff reductions under this Article, individual teachers shall be selected for full or partial layoff in accordance with the following steps:

Step 1 Attrition. Normal attrition resulting from employes retiring or resigning will be relied upon to the extent it is administratively feasible in implementing layoffs.

Step 2 Part-time Employes. The Board shall attempt to accomplish staff reduction wherever possible by reducing the hours of part-time employes before laying off full-time employes or partially laid off employes.

Provided, however, that, where the Board determines for just cause that the selection of a part-time employe for layoff would not be in the best interests of the District because such employe's selection would jeopardize the continuation of a program involving students which the Board wishes to retain or its having a qualified employe for such a program, the Board may exempt such employes from the application of this Step and retain him/her in the District's employ while proceeding to layoff other employes.

A part-time employe is an employe who accepted part-time employment at the time of hiring and who has subsequently, maintained part-time employment status. A part-time employe is not a partially laid off employe.

Step 3 In the event the Board cannot accomplish layoffs by Steps 1 and 2, it may proceed to layoff full-time employes and partially laid-off employes. A partially laid-off employe is an employe who was hired as a full-time employee and who maintained full-time employment status until his/her hours were reduced.

From among these employes, the Board shall select employes for a reduction in the Department(s) where such reduction(s) are to occur in the order of the employe(s) length of service in the District, commencing in each department with the employe in that department with the shortest service.

Provided, however, that where the Board determines for just cause that the selection of an employe for layoff solely upon the basis of seniority would not be in the best interests of the District because such employe's selection would jeopardize the continuation of a program involving students which the Board wishes to retain or its having a qualified employe for such a program, the Board may exempt such employe from the application of this Step and retain him/her in the District's employe while proceeding to layoff other employes with greater length of service.

Seniority - For purposes of this Article, seniority shall apply to the continuous employment of full-time employes and of partially laid off employes. For purposes of this Article, seniority shall be the employe's length of service as measured from the commencement of the employe's first day of employment under his/her initial full-time contract, and, where two (2) or more employes began such employment on the same day, the respective dates upon which the Board offered such employes employment shall be used to establish their length of service; provided that, if there still remain two (2) or more employes subject to layoff selection who were offered employment on the same date, such selection shall be determined among such employes on a lottery basis. For purposes of this Article, an employe's service in the District shall not include any period of time in which the employe has worked for the District in a non-bargaining unit, administrative or managerial capacity, nor any school semester or term after the first summer during which an employe is fully laid off.

A District-approved leave of absence shall not be deemed a break in an employe's continuity of employment and the period thereof shall be included in determining the number of full consecutive school years that he/she worked in the District.

Step 4 Refusal of Partial Layoffs. Any employe who is selected for a reduction in hours (partial layoff) under Step 3, and who is not able to retain a substantially equivalent position, may choose to be fully laid off, without loss of any rights and benefits as set forth in Section 4 and 7 below.

Section 4. Recall.

Recall rights under this Section shall extend to employes on full-layoff or partial layoff (i.e., those employes whose hours have been reduced under Step 3 of Section 3 above).

If the District has a vacant position or a portion of a position available for which a laid off employe is qualified according to the District's records, the employe shall be notified of such position and offered employment in that position, commencing as of the date specified in such notice. Under this Section, employes on layoff will be contacted and recalled for a position within a department in reverse order of their layoff from that department. In the event two (2) or more employes who are so qualified were laid off from a department on the same date, the Board shall select the employe who has the longest service in the District as determined under Step 3 of Section 3 above.

Within fourteen (14) days after an employe receives a notice pursuant to this Section, he or she must advise the District in writing that he or she accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to this Section shall be mailed by certified mail, return receipt requested, to the last known address of the employe in question as shown on the District's records. It shall be the responsibility of each employe on layoff to keep the District advised of his or her current whereabouts. The Board shall simultaneously provide the Association with copies of any recall notices which are sent to employes on layoff status pursuant to this Section.

Any and all recall rights granted to an employe on layoff pursuant to this Article shall terminate upon the earlier of (i) the expiration of such employe's recall rights period, or (ii) such employe's failure to accept within fourteen (14) days an offer of recall, as provided in this Section, to a substanially equivalent position. For purposes of this Article, the term "employe's recall rights period" is three (3) years following the employe's most recent layoff to full layoff status, the three-year period ending on the first day of the fourth school year after such full layoff.

Employes on partial layoff shall have an unlimited recall rights period. Partially laid off employes shall accept recall to increased employment or shall be considered least senior for purposes of layoff under Step 3 Section 3 above.

A full-time employe on full layoff status may refuse recall offers of part-time (i.e., not substanially equivalent position), substitute or other temporary employment without loss of rights to the next available full-time or substantially equivalent position for which the employe is qualified. Full-time employes on layoff status shall not lose rights to a full-time position by virtue of accepting part-time or substitute appointments with the District.

No new or substitute appointments may be made by the District while there are employes who have been laid off or reduced in hours who are available and qualified to fill the vacancies.

Section 5. Definition of "Qualified."

For purposes of this Article, "qualified" means certified by the Wisconsin Department of Public Instruction at the time the person is to begin the new assignment, if such certification is required by the position. If DPI certification is not required for the position, "qualified" shall mean prior experience in the assignment or position, or, if such experience is lacking, able to perform the assignment in the opinion of the Board.

Section 6. Definition of "Substantially Equivalent Position."

For purposes of this Article, "substantially equivalent position" means:

(A) A full-time-equivalent position which is not less than eighty-five percent (85%) of the full-time-equivalent position at which the employe was employed at the time of preliminary layoff notification.

(B) Rights, priveledges, and benefits equal to those which the employee received at the time of preliminary layoff notification, with the exception of salary which shall be prorated.

Section 7. Benefits During Layoff.

Employes who are laid off shall remain eligible for inclusion in all of the District's group insurance programs under the same terms and conditions as are applicable to all regular members of the bargaining unit, during the summer immediately following the employe's layoff notice.

No employe on full or partial layoff shall be precluded from securing other employment while on layoff status.

Employes on full layoff will be eligible for inclusion in all of the District's group insurance programs, to the extent such policies allow their eligibility, provided the laid off employe reimburses the District for the full premium for such coverage. Such eligibility shall continue until the end of the employe's recall rights period except that it shall be suspended while the employe is employed on a full-time basis for another employer.

Employes on full layoff shall retain the same amount of seniority, based upon length of service in the District as set forth in Section 3 Step 3 above, as she or he had accrued as of the date she or he was laid off. If a laid off employe is recalled, such employe shall again begin to accrue full seniority.

Employes on full layoff shall retain the amount of sick leave they had accrued as of the date she or he was laid off, and, if she or he is recalled, shall again begin to accrue sick leave.

Partially laid off employes, who were laid off from full-time employment, shall have all the rights and privileges of full-time bargaining unit members under this Agreement, with the exception of salary (which shall be prorated), shall accrue full seniority while on partial layoffs, as set forth in Section 3 Step 3 above, and shall accrue full sick leave.

Section 8. Grievance Procedure.

If an employe or the Association wishes to challenge the Board's actions in reducing or laying off employes, they may file a grievance beginning at the District Administrator level (Step 3) of the Grievance Procedure under this Agreement, no later than ten (10) working days after receiving final notice or layoff under Section 2 above.

Section 9. Definition of "Department."

For purposes of this Article a "Department" is defined as those teachers who have been grouped together by the District to teach classes related to each other or to perform related professional educational responsibilities.

As indicated in Finding of Fact 3, the Association submitted a letter to the District regarding its layoff and recall proposal, stating that neither the Association nor any of the employes involved had waived or limited their right to enforcement of individual teacher contracts pursuant to Secs. 118.21 and 118.22, Stats. Prior to the close of the mediation-arbitration investigation by the Commission, the District filed its petition initiating the instant declaratory ruling proceeding pursuant to Sec. 111.70(4)(b), Stats., seeking a determination in the matter. Hearing was conducted in the matter, a transcript thereof was prepared and sent to the Counsel for the parties. The District filed a brief. The Association's Counsel restated its position in a letter, and referred to its brief filed with the Commission prior to the hearing.

The Position of the District

The brief filed by the District's Counsel succinctly sets forth his rationale to support the District's claim that the proposal of the Association relates to a permissive subject of bargaining. Counsel argues:

> In current negotiations, the District has proposed that the language of the most recent agreement be readopted without change. In contrast, the Association has proposed a provision whereby staff reduction would be subject to an elaborate layoff procedure which requires the District to follow seniority, to maintain certain benefits during layoff, and to recall in reverse order of layoff when openings occur.

In the initial version of its proposal, the Association included express restrictions upon the timing and frequency of layoffs. However, when the District objected to these restrictions as permissive subjects of bargaining, the proposal was revised to delete them during the course of a MED/ARB investigation on September 24, 1981.

But the deletion was not unconditional. It was accompanied by a letter from the Association negotiator to the District clerk which included the following statement of intent. 2/

Simply put, what this letter accomplished was the linkage of the Association's layoff proposal with Sec. 118.22. And that is precisely what the Commission has ruled, in West Bend Joint School District No. 1, Decision No. 18512 (1981), does not constitute a mandatory subject of bargaining.

> "The Commission concludes that the Association by tying the timing and frequency of layoffs to Section 118.22, imposes an unwarranted restriction upon the employer's right to lay off personnel. The Association's proposal and its reliance on Section 118.22 requires a preliminary notice and the right to private conference, before the layoff decision, all within a narrow specified time period during the school year 5/ and further limits the layoff to the end of the school year. Thus the Association's proposal requires more than just notice of impending layoffs but rather interferes with the Employer's right to determine when layoffs are to occur. We therefore conclude that the Association's proposal is primarily related to the formulation, implementation and management of public policy and not primarily related to wages, hours and conditions of employment." (Footnote omitted. Decision No. 18512, p. 8)

That the linkage was accomplished in West Bend in one document, the collective bargaining agreement, and in the instant case by two docuemtns, the agreement and the letter of intent, is a distinction without a difference.

The refusal to "waive" any rights of teachers with regard to their individual contracts is just a euphemism for the insistence upon linkage with Sec. 118.22. Contrary to the letter's claim, it is not something the Association must do to fairly represent teachers. It is an attempt to accomplish by indirection what another WEAC affiliate failed to accomplish directly in the West Bend case.

. . .

Just what is involved was brought into sharp focus when the District expressed its consent to the dismissal of the petition in its entirety if the Association would simply add to its proposal these words:

> "It's the intent of the parties that Section 118.22 of the Wisconsin Statutes does not apply to this layoff provision." (Tr. 3-4)

2/ The letter set forth in Finding of Fact 3.

The reply of counsel for the Association was this:

> "The Association does not agree to this disingenuous proposal." (Tr. 4)

Why, one might ask, is it important that the Association makes all these verbal and written reservations when its proposal does not seek to place express language in the collective bargaining agreement regarding linkage with Sec. 118.22? The answer lies in the fact that the bargaining history created by the explicit reservations will serve to establish in any judicial, administrative or arbitration proceeding that the absence of language regarding layoff timing is tended to mean that Sec. 118.22 applies.

Without that bargaining history the contractual silence would mean that layoff could be accomplished at any time.

. . .

The Association argues that this should be classified as a case where the District is seeking to force the Association to waive the rights of individual teachers under Sec. 118.22. That argument would be appropriate only if the District were proposing a layoff provision allowing for a layoff within the term of the individual teacher contract. Maybe such a proposal by the District would be a permissive subject. Maybe not. But regardless, the District is not making any such proposal. It proposes no layoff provision at all; under its proposal Sec. 118.22 would apply in its entirety to all staff reductions - but there would be no seniority, no benefits and no recall. The Association wants the best of both worlds, and it is that Association demand which is the permissive subject of bargaining under the West Bend case.

The Association's Position

Prior to the hearing herein, and following the filing of the declaratory ruling petition by the District, the Association filed a motion requesting the Commission to dismiss the petition on the basis that there existed no "legitimate dispute" regarding the District's duty to bargain with the Association on the latter's revised proposal with respect to teacher layoff. Should the Commission choose not to summarily dismiss the petition the Association asked the Commission to issue an order requiring the District to show cause why its petition should not be dismissed for the same reason. The Association, at the time of filing said motions, also filed a brief in support thereof. The Commission did not formally address said motions, but rather set hearing in the matter for December 21, 1981. Following the hearing Counsel for the Association submitted a written statement in letter form with respect to its position and urged the Commission to consider its arguments contained in its pre-hearing briefs.

The brief filed by Counsel for the Association was also succinct and basically set forth arguments that there existed no "legitimate dispute" with respect to its layoff provision as written. It urged the Commission to dismiss the District's petition in order not to delay the mediation-arbitration proceeding which was at the time also pending. The Association's brief contained the following rationale in support of its position:

> . . . a reading of the Association's layoff proposal reveals not a single reference to sec. 118.22, Stats., nor the presence of any restraints on the timing and frequency of teacher layoffs. In fact, the District itself acknowledges that the language of the Association's layoff proposal "contains no express retraints on timing and frequency (of teacher layoffs)." See Statement in Support of Petition. Contrary to the erroneous assertions of the District, the Association's current layoff proposal does not require the

District to follow the provisions of sec. 118.22, Stats., in implementing teacher layoffs. Although, in earlier layoff proposals submitted to the District during the current negotiations, the Association did attempt to bargain provisions governing the timing and frequency of teacher layoffs, the District consistently refused to bargain with the Association regarding that issue and, as a result, the Association withdrew its proposal on that subject. The Association's current layoff proposal does not limit layoff by the time restraints contained in sec. 118.22, Wis. Stats." To the contrary, the Association's layoff proposal contains no provisions governing the timing and frequency of teacher layoffs. Thus, the Association's current layoff proposal cannot even remotely be considered a permissive subject of bargaining under the Commission's West Bend decision.

In order for the Commission to have jurisdiction to issue a declaratory ruling under sec. 111.70(4)(b), Stats., there must exist "a dispute . . . between a municipal employer and a union of its employes concerning the duty to bargain on any subject." The District's Petition in this case is entirely premised on the allegation that such a dispute has arisen between the parties concerning the duty to bargain on a layoff proposal which links "a layoff and recall procedure with the requirements of sec. 118.22, Wisconsin Statutes." However, as the language of the Association's layoff proposal and the correspondence between the parties demonstrate, there has arisen no such dispute. The Association, in its current layoff proposal to the District, has not sought to bargain over the subject of the timing and frequency of teacher layoffs, nor does its current layoff proposal limit teacher layoffs by the time restraints contained in sec. 118.22, Stats.

The "dispute" which the District seeks to litigate before the Commission in this proceeding involves neither the language of the Association's current layoff proposal, nor even the "intentions" of the Association regarding the relationship between that layoff proposal and sec. 118.22, Stats. As a reading of the Association's layoff proposal demonstrates, the proposal contains no language limiting the timing and frequency of teacher layoffs. Regarding the "intentions" of the Association, the District has been advised that the Association does not contend that its current layoff proposal requires the District to follow sec. 118.22, Stats., in implementing teacher layoffs. The Association has expressly stated to the District that it acknowledges that its current layoff proposal does not "limit layoff by the time restraints contained in sec. 118.22, Wis. Stats."

The current dispute arising out of the negotiations between the District and the Association does not involve a disagreement over the duty to bargain on the subject of teacher layoffs. Instead, it involves the District's demand that the Association agree to waive whatever rights individual teachers may have under state or federal law with regard to their individual employment contracts with the District. With regard to this dispute, the Association's position has simply been that, while it has agreed to withdraw any bargaining proposals on the subject of timing and frequency of teacher layoffs in response to the District's consistent refusal to bargain over that issue, it will not agree to bargain a waiver of any individual rights which teachers may have under their employment contracts with the District. The Association is entitled to refuse to agree to any such waiver of individual teachers' rights under the reasoning of the Commisssion's decision in Deerfield Community School District, WERC Dec. No. 19503 (12/19/79), affirmed by Dane County Circuit Court, Case No. 80-CV-260 (January 1981). See also, Faust. v.

Ladysmith-Hawkins School Systems, 88 Wis.2d 525, 532-533 (1979). Moreover, a declaratory ruling proceeding before the Commission pursuant to sec. 111.70(4)(b), Stats., is not the appropriate forum for resolving a dispute over the nature of rights which individual teachers may have under their employment contracts with a school district.

The Association also urged the Commission to summarily dismiss the District's petition, and in support thereof argued:

> If the District is allowed to proceed with its Petition in this case, the Association and the employes whom it represents will be significantly harmed. The District's Petition alleges that a dispute has arisen concerning the duty to bargain on a topic which is not contained in the Association's layoff proposal. The District claims that the Association's layoff proposal is "intended" to restrict District rights in a manner which the Association expressly disavowed. If the District is nevertheless permitted to invoke the lengthy procedures of the Commission for processing declaratory ruling petitions, with its inherent suspension of the bargaining process for months, the Commission will have effectively allowed the District to prevent the Association from obtaining (either through a voluntary settlement or through the procedures of mediation-arbitration) a contract provision governing teacher layoffs during the 1981-1982 school year and, quite probably, the 1982-1983 school year as well. Such a result, in a situation such as that presented in the instant case where the District has blatantly misinterpreted the Association's layoff proposal and has failed to raise a legitimate "dispute . . . concerning the duty to bargain", is inconsistent with the right to engage in meaningful collective bargaining and to utilize "fair, speedy, effective" procedures for settling impasses in the bargaining as guaranteed in sec. 111.70(2) and (6), Stats.

Discussion

The Commission set hearing in the matter, rather than ruling on the pre-hearing motions filed by the Association, for two reasons. First, to attempt to resolve the dispute involved in this proceeding prior to or during the course of the hearing, and second, should such an attempt prove fruitless, to permit the parties to present all pertinent evidence, and additional argument if they so desired. Our efforts toward a resolution of the issue proved unsuccessful, and the matter proceeded to a formal hearing. The issues raised by the pleadings were brought into clearer focus as a result of the evidence adduced during the hearing and the exchanges between the Commissioners and both counsel during the course of the hearing. In retrospect, we conclude that our original determination not to rule on the matter prior to hearing was correct since there are issues involved herein which we deem necessary to address.

The District has made no objection to any specific portion of the Association's layoff proposal. The sole basis for the District's assertion that the Association's layoff proposal is permissive is the District's belief that the Association intends its contractual proposal to mean something other than what it says. Thus the Commission is confronted with the question of whether a proposal, which on its face makes no mention of Sec. 118.22 Stats. and does not purport to limit the timing and frequency of layoffs, can become permissive based upon certain expressions of intent from the proposals proponent. The Commission thinks not.

Initially it should be noted that the Association has removed all objectionable language which sought to impose the time constraints of Sec. 118.22, Stats. upon any layoff. Further, the Association has expressly stated to the District that it acknowledges that its current layoff proposal does not "limit layoff by the time restraints contained in Sec. 118.22, Wis. Stats.".

The Commission in declaratory ruling proceedings under Sec. 111.70(4)(b) and Sec. 111.70(4)(cm)6 g, Stats., is required to decide whether a "proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining . . ." (emphasis added). When making that determination, the Commission looks to the language of the proposal itself. If the proposal is ambiguous and may be construed to primarily relate to the formulation or management of public policy, 3/ it will be found to be permissive even if the proponent of the proposal asserts that no such permissive interpretation was intended. Where, as here, there is no objection to any specific language contained in the proposal and the proposal primarily relates to wages, hours and conditions of employment, 4/ it will be found to be mandatory even if the objecting party suspects that the proponent may subsequently claim the language is subject to a permissive interpretation. Inasmuch as the layoff proposal at issue herein does not obligate the District to follow the time restraints of Sec. 118.22, Stats., if it chooses to lay off employes, 5/ as acknowledged and admitted by the Association, it cannot be found to be permissive on that basis even if the District suspects that the Association will subsequently take a contrary position.

As the District's position has been found to lack merit, as the District has made no other objection to the proposal in question, and as said proposal primarily relates to wages, hours, and conditions of employment, the Association's proposal has been found to be a mandatory subject of bargaining.

Dated at Madison, Wisconsin this 12th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Herman Torosian, Commissioner

3/ The test set forth by the Wisconsin Supreme Court for defining permissive subjects of bargaining in United School District No. 1 of Racine County v. WERC 81 W. 2d 89 (1977).

4/ The Wisconsin Supreme Court's definition of a mandatory subject of bargaining. See Racine supra.

5/ This fact distinguishes this case from the West Bend case where the contract layoff language proposed specifically included the time constraints of Sec. 118.22, Stats.

CONCURRING OPINION

In the West Bend School District case, previously cited in this Memorandum, the Commission was called upon to determine the bargainability of a "reduction in force" proposal submitted by the bargaining representative of the teachers in the employ of that district, which proposal, on its face, included language to the effect that layoffs were to be made "in accordance with the time frame and provisions of Section 118.22, Wis. Stats." In West Bend that District argued that the proposal therein improperly integrated the concept of layoff and non-renewal which the Wisconsin Supreme Court in Mack v. Joint School Dist. No. 3, 92 Wis. 2d 476, 1979, held are distinct and separate. In Mack the majority of the Court held that a layoff of a teacher is not equivalent to a "refusal to renew" an individual teacher contract under Sec. 118.22, Wis. Stats.

In West Bend we concluded as follows:

> The Commission concludes that the Association by tying the timing and frequency of layoffs to Section 118.22, imposes an unwarranted restriction upon the employer's right to lay off personnel. The Association's proposal and its reliance on Section 118.22 requires a preliminary notice and the right to private conference, before the layoff decision, all within a narrow specified time period during the school year and further limits the layoff to the end of the school year. Thus the Association's proposal requires more than just notice of impending layoffs but rather interferes with the Employer's right to determine when layoffs are to occur. We therefore conclude that the Association's proposal is primarily related to the formulation, implementation and management of public policy and not primarily related to wages, hours and conditions of employment.

It is obvious that the proposal involved herein as written does not limit the District's right to layoff personnel, nor its right to determine when such layoffs are made. It is true that in its letter, alleged by the District to tie in Sec. 118.22, Stats., to layoffs, the Association expresses the view that said statutory provision applies to layoffs, however, I interpret the majority opinion in the Mack case as determining otherwise.

It appears to the undersigned that the Association, at least on behalf of itself, by its proposal, on one hand has agreed that the District has the right to determine whether a layoff is necessary and when such layoff may occur, while on the other hand, by its letter, it warns the District that should layoffs occur at times other than the close of the school year, the Association "will view the layoff as a breach of the individual teaching contract and will seek action in court for damages for such breach." The Commission has no authority to restrain the Association from seeking such relief in a court action.

Dated at Madison, Wisconsin this 12th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Commissioner