STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of RACINE EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and RACINE UNIFIED SCHOOL DISTRICT	Case LXIX No. 30349 DR(M)-247 Decision No. 19980-B
In the Matter of the Petition of RACINE EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and RACINE UNIFIED SCHOOL DISTRICT	Case LXX No. 30350 DR(M)-248 Decision No. 19981-B

Appearances:

Schwartz, Weber & Tofte, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Association.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Jack D. Walker, 119 Monona Avenue, Madison, Wisconsin 53701, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Racine Education Association having on September 9, 1982 filed two petitions with the Wisconsin Employment Relations Commission, herein Commission, requesting the Commission to issue declaratory rulings, pursuant to Section 111.70(4)(b) of MERA, as to whether certain provisions contained in its 1979-82 collective bargaining agreement with the Racine Unified School District were mandatory subjects of collective bargaining; and the Commission having on October 8, 1982 consolidated the petitions for the purposes of hearing; and hearing having been held in the matters on November 3, 1982, by Lionel L. Crowley, Examiner; and briefs having been filed by the parties by December 7, 1982; and the Commission having considered the evidence and arguments of counsel, and being fully advised in the premises makes and issues the following

FINDINGS OF FACT

1. That Racine Education Association, hereinafter referred to as the Association, is a labor organization and has its offices at 701 Grand Avenue, Racine, Wisconsin 53403.

2. That Racine Unified School District, hereinafter referred to as the District, is a municipal employer and maintains its offices at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

3. That at all times material herein, the Association has been the certified exclusive collective bargaining agent 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 directors; that in said relationship the District and the Association have entered into a series of collective bargaining agreements, the last of which by its terms expired on August 24, 1982; and that the last agreement contained the following provisions:

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."

. . .

XXII. ENTIRE AGREEMENT

2. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject as provided by Wisconsin Statute 111.70 and that the understandings arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.

. . .

4. That the Association and the District have engaged in collective bargaining for a successor agreement to the agreement that expired on August 24, 1982; that the District has proposed that the provisions set forth in Finding of Fact 3 be continued in any new agreement; and that the Association has contended that said provisions are permissive rather than mandatory subjects of bargaining, which resulted in the filing of the instant petitions by the Association.

5. That the District's proposals as set forth in Article III, Sections 6 and 7 relate primarily to the formulation or management of public policy, while the District's proposal as set forth in Article XXII, Section 2 relates primarily to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. That the District's proposals as set forth in Article III, Sections 6 and 7 of the parties' 1979-82 collective bargaining agrement, relate to permissive rather than a mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

2. That the District's proposal as set forth in Article XXII, Section 2 of the parties' 1979-82 collective bargaining agreement relates to a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

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

DECLARATORY RULING 1/

set forth in Article III, Sections 6 and 7 of the parties' 1979-82 collective bargaining agreement.

2. That the Racine Education Association has the mandatory duty to bargain collectively with the Racine Unified School District with respect to the proposal set forth in Article XXII, Section 2 of the parties' 1979-82 collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

Herman Torosian, Commissioner

1/ (Continued)

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 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.

RACINE UNIFIED SCHOOL DISTRICT, Case LXIX, Decision No. 19980-B, Case LXX, Decision No. 19981-B

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

The issue presented by the instant petitions is whether the District's proposals, as set forth in Article III, Sections 6 and 7 and Article XXII, Section 2 of the parties' 1979-82 collective bargaining agreement, are permissive or mandatory subjects of bargaining within the meaning of Section 111.70(1)(d), of the Municipal Employment Relations Act (MERA).

Association's Position:

The Association contends that Article III, Sections 6 and 7 and Article XXII, Section 2 are blanket waiver-of-bargaining provisions which are permissive subjects of bargaining. The Association points out that these provisions were agreed to and included in the parties' collective bargaining agreements prior to the enactment of the binding arbitration law contained in Section 111.70(4)(cm), of MERA. It notes that the provisions were included in the 1979-82 collective bargaining agreement pursuant to a mediator/arbitrator's decision. 2/ The Association relies on the Commission's decision in Deerfield Community School District 3/, and argues that the disputed provisions are similar to the blanket waiver which the Commission, on grounds of public policy, held was repugnant to the basic policies of MERA, and thus not a mandatory subject of bargaining. The Association points to numerous decisions of the Commission that have construed the disputed provisions as constituting a waiver of the District's duty to bargain over any policy decisions affecting wages, hours or conditions of employment, or the impact thereon. 4/ The Association argues that these waiver provisions emasculate the right and duty of the Association to bargain during the term of the agreement as to matters which were not within the knowledge or contemplation of either of the parties, and therefore, the provisions are permissive subjects of bargaining and cannot be included in final offers. The Association also contends that public policy considerations support its position.

District's Position:

The District contends that the integration and meet and confer clauses are standard contract provisions which relate primarily to employment terms and as such are mandatory subjects of bargaining. It admits that in the past it has argued that these clauses are waivers of certain subjects in dispute and that the Commission has found waivers in certain cases, but it takes the position that a mandatory-permissive distinction cannot be based on a party's arguments on the scope of a waiver in a specific case. The District claims that the Association is attempting to expand the rationale of the Deerfield 5/ decision to the present case. It points out that only one subsection involved in that case was held to be non-mandatory, and that such language is not present here. It asserts that the instant clauses do not, on their face, compel a waiver of matters not contemplated, or of matters to which there is not an iota of evidence of waiver. Rather, it contends that the present language merely allows waiver to be determined on a case by case basis.

2/ Racine Unified School District.

3/ Decision No. 17503, 12/79.

4/ Racine Unified School District No. 1, (13696-C, 13876-B) 4/78; Racine Unified School District, (18848-A) 6/82; Racine Unified School District, (19357-A) 11/82.

5/ Tr. 4, supra.

Should the Commission agree with the Association's contention that Deerfield 6/ is controlling, the District argues that the Commission erred in Deerfield in that it confused interpretation of a waiver clause with the principle of the clause as a basis for waiver. It maintains that any waiver clause is per se mandatory and its effectiveness must be determined on a case by case basis. It asserts that the Court in the Deerfield case 7/ on appeal rejected federal law and failed to determine whether a waiver clause was a mandatory subject of bargaining. The District argues that since the Commission's waiver clause interpretation rule is based on analogous federal law, the Commission's position on mandatory subjects should also apply analogous law which holds that an integration clause is a mandatory subject of bargaining. The District counters the Associations' argument that it cannot be compelled to waive its rights to bargain, by asserting that compulsion is not a factor in determining whether a subject is mandatory and that the results of collective bargaining are "voluntary" even if they are the end product of interest arbitration.

The District asserts that because it is a public entity, it must be able to make changes constantly to meet the needs of the public, of which the Association is only a part, and therefore it should be allowed to insist on even broader waiver clauses than private sector employers who arguably do not have the same relationship to the public. The District also claims that all bargaining agreements are the result of package proposals whereby the parties waive all other claims not mentioned, hence a blanket waiver with respect to all other matters, even those not contemplated, is a mandatory subject of bargaining. The District argues that the clauses in issue here also have purposes apart from waiver which also are mandatory subjects of bargaining.

Discussion:

The Wisconsin Supreme Court has defined a mandatory subject of bargaining under Section 111.70(1)(d) of MERA as a matter which is primarily related to wages, hours and conditions of employment. However, where the matter primarily relates to basic educational policy, it is permissive, although the impact of the establishment of educational policy on wages, hours and conditions of employment is bargainable. 8/ Whether a matter is mandatory or permissive must be determined on a case by case basis. 9/ The Commission has applied the above test to waiver clauses and has held that a waiver proposal is a mandatory subject of bargaining where it relates to a matter which is covered by the existing collective bargaining agreement, or to a matter which arose during negotiations leading to the agreement. 10/ The Commission has held that a waiver clause is a permissive subject of bargaining where it relates to a matter which may not have been within the knowledge or contemplation of either or both of the parties at the time the agreement was negotiated or signed. 11/

In determining whether a clause is mandatory or permissive, the Commission looks to the language of the clause itself and if it is ambiguous and may be construed to relate primarily to the formulation of educational policy, it will be

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6/ Ibid.

7/ Deerfield Community School District v. WERC, Case No. 80-CV-264 (Dane County, 1981).

8/ Beloit Education Association v. WERC, 73 Wis. 2d 43, 242, N.W. 2d 231 (1976). Unified School District of Racine v. WERC, 81 Wis. 2d 89, 259, N.W. 2d 724 (1977).

9/ Ibid.

10/ Deerfield Community School District, (17503) 12/79.

11/ Ibid.

determined to be permissive, even where such interpretation was not intended by the proponent of the clause. 12/ Application of the above principles to the disputed clauses results in the following conclusions.

Contrary to the contention of the Association, the Commission's decision in Deerfield does not support a conclusion that Article III, Sections 6 and 7 are permissive subjects. The language at issue herein does not require a waiver of bargaining on subjects relating to wages, hours, or conditions of employment which "may not have been within the knowledge and contemplation of either or both of the parties" at the time of entering into an agreement, which was the case in Deerfield.

Article III, Section 6 provides that the Association shall be informed of any "contemplated" changes in policy which affect working conditions in order that the Association may present its views to the Board. The changes in policy referred to in this clause include changes in educational policy which affect working conditions. 13/ Since the establishment of an educational policy is clearly a permissive subject of bargaining, 14/ it follows that a proposal requiring input by the Association as to the policy, prior to any changes thereof, would also constitute a permissive subject of bargaining.

Article III, Section 7 provides that the Superintendent will meet and confer with the Association's representatives prior to a change in policy that has a substantial effect on the wages, hours and conditions of employment of teachers. Again, the policy referred to here is educational policy, a change in which has a substantial impact on the wages, hours and conditions of employment of bargaining unit employes. An employer has a duty to bargain with the representative of its employes with respect to the impact of a change in policy on wages, hours and conditions of employment during the term of an existing collective bargaining agreement, unless bargaining thereon has been clearly and unmistakably waived. 15/ However, the employer can determine to change educational policy, which is a permissive subject of bargaining, before being required to bargain over the impact of the change upon wages, hours, and conditions of employment. 16/ Inasmuch as Article III, Section 7 requires the parties to meet and confer prior to a change in educational policy, and, as the District cannot be required to do so, the provision is permissive. This does not mean that the Association does not have the right to obtain notice of any change in policy that may impact on wages, hours and working conditions once the actual decision is made, which may be either before or after the implementation of the decision, in order to bargain on the impact thereof.

Turning to Article XXII, Section 2, this clause is a standard integration provision. Although the District could argue, as contended by the Union, that in a specific case this clause is a blanket waiver which allows it freedom to take any action it deems appropriate to change a mandatory subject of bargaining, this possibility does not convert the clause into a permissive subject. Unlike the blanket waiver of bargaining found permissive in Deerfield, this integration clause does not provide for the elimination of the right to bargain in accordance

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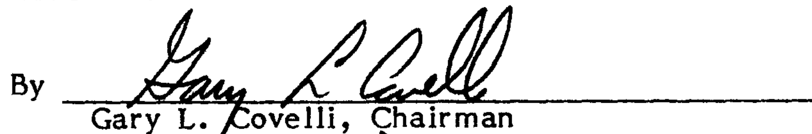
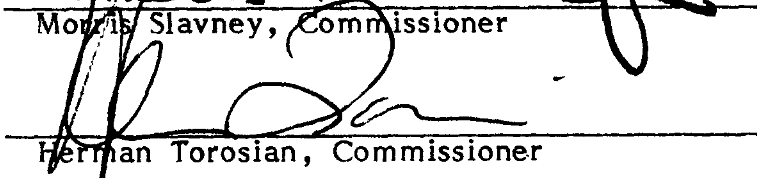
with the statutory scheme set forth in MERA. Rather, it is a statement that the parties have fulfilled their bargaining obligations and the end result of such bargaining is the parties' collective bargaining agreement. Therefore, we find that the clause is mandatory.

Dated at Madison, Wisconsin this 31st day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman

Morris Slavney, Commissioner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