STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

S.E.I.U., LOCAL 152, Complainant, vs. RACINE UNIFIED SCHOOLS, Respondent.	Case LXV No. 29906 MP-1343 Decision No. 19983-B

Appearances:

Mr. Mark F. Nielsen, Schwartz, Weber, Tofte & Nielsen, Attorneys at Law, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Complainant.

Mr. Thomas R. Crone, Melli, Walker, Pease, and Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having, on June 14, 1982, filed a complaint with the Wisconsin Employment Relations Commission, wherein it has been alleged that the above-named Respondent has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on October 8, 1982, having appointed Sherwood Malamud, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats.; and due to the subsequent unavailability of Sherwood Malamud, the Commission having, on August 8, 1983, vacated the designation of Sherwood Malamud as Examiner and appointed William C. Houlihan, another member of its staff, as Examiner; and no hearing having been held, the parties having waived hearing and submitted a stipulation as to fact in lieu of hearing; and the Complainant having submitted a brief, received September 14, 1983; and Respondent having submitted a brief received September 2, 1983, and a reply brief, received September 23, 1983; and the Examiner having closed the briefing scheduled by letter of October 12, 1983; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

STIPULATED FINDINGS OF FACT

1. Complainant is a labor organization within the meaning of Sec. 111.70 (1)(j), Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70 (1)(a), Stats.

3. Complainant was certified by the Wisconsin Employment Relations Commission in Case LVII, No. 27617, ME-1975, Dec. No. 18707 as the bargaining representative of all regular full-time and regular part-time secretarial employes and clerical employes in the employ of the District, excluding supervisors and confidential employes, on June 16, 1981.

4. Prior to Complainant's certification, the Racine Education Secretaries Association represented the above-described unit by virtue of a certification issued by the Wisconsin Employment Relations Commission in Case VI, No. 13813, ME-563, Dec. No. 9670 on June 23, 1970.

5. Prior to Complainant's certification, Respondent and Racine Education Secretaries Association entered into a series of collective bargaining agreements, the most recent of which was for the period August 20, 1979 through June 30, 1981. That agreement contained the following provisions among its terms:

BOARD RIGHTS Article IV

1. The Board retains, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and invested in it by the laws and Constitution of the State of Wisconsin, and/or the United States, including, but without limiting the generality of the foregoing, the sole and exclusive right to hire, assign, transfer, promote, demote, discipline, and discharge all employees, to determine the basis of selection, retention, and promotion, to direct and supervise the performance of any and all work, to judge efficiency and competency in the performance of work assigned, to dismiss or lay off temporarily or permanently as operations may require, and to subcontract any and all work.

2. The exercise of these powers, rights, authority, duties, and responsibilities by the Board and the adoption of such rules, regulations, and policies as it may deem necessary shall be limited only by the specific and express terms of this Agreement.

GRIEVANCE PROCEDURE Article V

1. A grievance is a claim which alleges that one or more provisions of this Agreement have been incorrectly interpreted and applied. Such claim must be based on an event or condition which affects wages, hours, and/or conditions of employment of one or more secretaries.

. . .

LEVEL FOUR (continued)

b. If the Association decides the grievance is meritorious, the Association may appeal the grievance to arbitration by notifying the Superintendent or his designee in writing of such appeal, within twenty (20) calendar days after the meeting with the Board.

c. In the event the Board and Association are unable to agree on an arbitrator within ten (10) work days after the written notice of appeal, the Federal Mediation and Conciliation Service will be requested by joint letter to submit a list of five (5) arbitrators. The parties shall strike a name alternatively, beginning with the Association, until one name remains. Such remaining person shall act as arbitrator. In subsequent selections, the parties shall alternate the first striking of a name.

d. The decision of the arbitrator shall be in writing and be final and binding on the Board, the Association, and any secretary involved.

. . .

There was no layoff provision in the 1979-81 agreement.

6. The agreement referred to in paragraph 5 provided in relevant part for a four step grievance procedure, the fourth step of which provided for final and binding arbitration.

7. Prior to May 1, 1981, notice of intent to terminate the agreement referred to in paragraph 5 was given and the agreement expired by its terms on June 30, 1981.

8. Following Complainant's certification, Respondent and Complainant commenced negotiations for a new collective bargaining agreement. At Complainant's request, the wage and fringe benefit provisions of the expired agreement were continued pending negotiations. There was no agreement to continue all terms of the expired agreement.

9. On or about November 3, 1981, the Respondent and Complainant reached a tentative agreement on a provision for layoff.

10. On February 5, 1982, Respondent posted an opening for an Accounting Clerk position. Pursuant to the terms of the posting, applications for the position were required to be submitted on or before February 12, 1982.

11. On or about February 10, 1982, Charlotte Bowen, a bargaining unit employee, applied for the position described in paragraph 10.

12. On or about February 22, 1982, Respondent implemented the provisions of the tentative agreement described in paragraph 9.

13. On March 19, 1982, Ms. Bowen was advised, by telephone, that she would not be awarded the position.

14. On March 23, 1982, Complainant filed a grievance on behalf of Ms. Bowen, contending a breach of the layoff procedure tentatively agreed to by the parties and subsequently implemented by Respondent.

15. On March 30, 1982, the grievance was denied and forwarded to Respondent's Grievance/Negotiating Committee on April 13, 1982.

16. On or about April 20, 1982, Complainant filed a written request with the Wisconsin Employment Relations Commission for appointment of a panel of arbitrators.

17. By letter dated May 4, 1982, Complainant advised Respondent of its two (2) strikes from the panel previously furnished.

18. By letter dated May 10, 1982, Frank Johnson, Respondent's Director of Employee Relations, responded to Complainant's letter as follows:

> This is in response to your letter of May 4, 1982, in which you invite me to select an arbitrator for the Charlotte Bowen grievance.
>
> As you know, this grievance arose during the period of time after the old secretarial contract expired and prior to the new contract being signed. It is my belief that the District has no obligation to arbitrate this grievance unless the contract provides for a continuing obligation beyond its expiration date. In this case it does not. Therefore, unless you can suggest reasons which would be persuasive, arbitration in this particular case must be declined.

19. On May 13, 1982, Complainant responded to Mr. Johnson's letter stating:

> Thank you for your letter of May 10th. I understand your position as stated therein. Our position is that the arbitrability provisions in the old contract do not qualify as evaporating benefits.
>
> Under the circumstances, I would request that you complete the selection process and raise the issue as a threshhold (sic) defense at the time of the arbitration proceedings. Thank you for your anticipated courtesy as always.

20. By letter dated June 7, 1982, Respondent stated that there was no change in its position.

21. A collective bargaining agreement between Complainant and Respondent was tentatively agreed to on or about March 29, 1982, subject to ratification by Respondent's School Board. On April 19, 1982, the tentative agreement previously reached was ratified and executed by the parties. That agreement contains the following provisions:

Article V

GRIEVANCE PROCEDURE

1. A grievance is a claim that one or more provisions of this Agreement have been incorrectly interpreted and applied. Written grievances shall include a summary of facts upon which a grievance is based and shall identify the provisions of this Agreement which the grieving party alleges have been incorrectly interpreted and applied. Such grievance shall be signed and dated. Failure to comply with this paragraph releases the Employer from any further obligation concerning the processing of the grievance until such has been done.

. . .

STEP FOUR

a. If no satisfactory decision has been rendered by the Board or its subcommittee, the employee may, within ten (10) work days after receiving the decision, request through the Union that such be submitted to binding arbitration by notifying the Wisconsin Employment Relations Commission by joint letter to submit a list of five (5) persons suitable for selection as arbitrator.

   The parties shall strike a name alternately until one name remains. The Union shall make the first strike on the first arbitration filed after this Agreement goes into effect, and the parties shall alternate first strikes thereafter.

b. The parties will make a reasonable effort to mutually schedule the arbitration within thirty (30) days from the date the arbitrator is selected.

c. The decision of the arbitrator shall be final and binding on the District, the Union, and any employees involved.

. . .

Article XXI

LAYOFF PROCEDURES

Whenever the District determines that a reduction in staff is necessary because of a decrease in students, educational revisions, school closings, budgetary or financial considerations, or other reasons which are not based on the employee's performance, the following layoff procedure shall be applied:

1. Certain job positions shall be declared surplus.

2. An employee who has had his/her job position declared surplus may post for any job vacancy for which he/she is qualified and will not be given priority consideration for such position over any present District employee or laid off District employee who is posting for the position but will be given priority consideration over non-employee candidates.

3. In the event there are two or more candidates for a job vacancy, the District will select the best qualified candidate. In the event these candidates have qualifications which are relatively equal, first consideration shall be given the employee with the greater length of service.

4. An employee who has had his/her job position declared surplus must post for all job vacancies for which he/she is qualified except those vacancies with a pay grade more than two grades lower than the position declared surplus. Failure to post for these positions will result in the employee being laid off.

5. An employee who has had his/her job position declared surplus and has posted for and received a job position in a lower pay grade may post at any time for the first job vacancy which is the same or exceeds the pay grade of the job declared surplus.

6. In the event there are no vacancies for which an employee who has has (sic) his/her job position declared surplus can apply or in the event the employee was not selected, the employee may:

   a. elect to take voluntary layoff, or;

   b. the District will assign the employee to a job position for which he/she is qualified not to exceed two grades lower than the position declared surplus provided such is occupied by an employee with less seniority. That employee will then be placed on layoff status.

7. Any employee who is laid off may post for any job vacancies for which he/she is qualified.

8. At his/her option, an employee on layoff may maintain group insurance benefits providing the employee pays the entire cost thereof.

9. If an employee has not posted and received a position within one year from date of layoff, his/her layoff status will cease and the employee will be considered terminated.

10. All employees on layoff status will be mailed by U.S. mail copies of any bargaining group postings at the time that such is first posted.

. . .

Article XXXX

DURATION

This Agreement shall be binding upon the parties hereto and shall be in full force and effect from July 1, 1981 through June 30, 1983. It shall automatically be renewed under the same terms and conditions for consecutive yearly periods thereafter unless either party by May 1, immediately before the expiration of this Agreement, notifies the other party in writing of a desire to negotiate a changed Agreement.

IN WITNESS WHEREOF, we have hereunto set our signatures this 19th day of April, 1982

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

CONCLUSIONS OF LAW

1. Complainant Service Employees International Union, Local 152, is a labor organization within the meaning of Sec. 111.70(1)(j), Wis. Stats.

2. Respondent Racine Unified School District is a municipal employer within the meaning of Sec. 111.70(1)(a), Stats.

3. That by refusing to proceed to arbitration over the Bowen grievance the Respondent has violated Sec. 111.70(3)(a)5, Wis. Stats.

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

ORDER 1/

That Respondent cease and desist from refusing to proceed to arbitration over the Bowen grievance.

Dated at Madison, Wisconsin this 19th day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C Houlihan
William C. Houlihan, Examiner

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case has been submitted for decision based upon a stipulated set of facts, set forth in the Stipulated Findings of Fact. No evidentiary hearing was conducted. In its complaint, Complainant alleges that the Respondent's refusal to submit Bowen's grievance to arbitration violates Sec. 111.70(3)(a)4 and 5, Wis. Stats. In its answer, Respondent denies that there is a duty to arbitrate grievances arising during hiatus periods between labor agreements and contends that implementation of tentative agreements during hiatus periods does not operate to convert those agreements into enforceable parts of a collective bargaining agreement prior to a complete agreement.

In its brief, Complainant points out that arbitration is the generally favored method of resolving disputes. According to Complainant, the layoff procedure was implemented following collective bargaining. To regard it as tentative is, argues the Complainant, to conclude that the District altered the status quo. Complainant contends that Bowen relied upon the implementation, thereby estopping the District. The collective bargaining agreement, including the arbitration provision, is retroactive to July 1, 1983. Complainant argues that the parties, with full knowledge that the layoff clause had been implemented and its application grieved, agreed to apply the contract retroactively. According to Complainant this constitutes a conscious agreement to subject those disputes to arbitration. Complainant contends that by following the grievance procedure the District waived any claim that Article V of the 1979-81 contract didn't apply.

The Respondent cites School District No. 6, City of Greenfield (19026-B) and Gateway Vocational, Technical and Adult Education District (14142-B) as authority for the proposition that the duty to arbitrate does not survive the expiration of the contract. Respondent cites Ozaukee County (18384-A) in support of its claim that tentative agreements do not become enforceable provisions of a labor agreement until an accord on a total agreement is arrived at. Taking the two cases together, Respondent argues that there was no duty to arbitrate the grievance under the expired agreement. Respondent claims that the duty to arbitrate is determined as of the date the grievance arises. Subsequent execution of a contract does not create a duty to arbitrate where no such duty previously existed. Respondent contends that City of Greenfield requires dismissal.

I do not agree with Respondent's contention that City of Greenfield compels dismissal of this action. In Greenfield, the collective bargaining agreement expired. Following expiration of the contract, the Employer took certain actions which were grieved by the Association. This occurred while negotiations for a successor agreement were taking place. The Union attempted to arbitrate its grievance; the Employer refused. The parties subsequently arrived at a successor agreement which was made retroactively effective. Two matters relevant to this case were raised in the complaint litigation that followed.

The first matter concerned the Employer's obligation to maintain the contractual grievance procedure during the hiatus period. The Examiner found that the grievance procedure, excepting the arbitration provision, survived the expira-

In such circumstances, where a union does have access to the statutory framework for the resolution of its disputes, and where there is no basis for finding that the statutory no strike prohibition is the quid pro quo for the contractual right to arbitrate, the Examiner concludes that the conscentual (sic) right to arbitrate should not be extended past a contract's termination date, unless the parties mutually agree to do so. To hold otherwise would turn a voluntary process into an involuntary one and it would be a direct repudiation of the well established concept that arbitration is a completely voluntary process in that it rests entirely upon a contractual basis. Accordingly, based upon the above noted considerations, the District here was not required to arbitrate a grievance which was filed and which arose over a fact that occurred after the contract's termination.

The conclusion of the Examiner in this regard was appealed to the Commission. The Commission affirmed the Examiner:

Abrogation of the Arbitration Procedure Contained in the Expired Collective Bargaining Agreement

We agree with the Examiner that the District was free not to follow the arbitration provisions of the expired collective bargaining agreement.

In arriving at this conclusion, we begin with the general rule that an employer must, pending discharge of its duty to bargain, maintain the status quo of all terms of the expired agreement which concern mandatory subjects of bargaining. Thus, even though the amount of wages owing originally was established by the expired agreement, an employer may not change the established wage rates without first discharging its duty to bargain over that item. This general rule, however, is subject to various exceptions, and an arbitration provision in an expired agreement is one of the well-recognized exceptions.

Although the issue whether to agree to an arbitration provision is a mandatory subject of bargaining, the duty to arbitrate is wholly contractual. Recognizing that the case law from the private sector has limited applicability to the extent it is based on the coterminous right of employes to strike, a right not enjoyed by public sector employes, nevertheless the power of an arbitrator is solely dependent on the terms of an agreement, and the arbitrator's responsibility is to construe a contract. If the contract has expired, the arbitrator has no powers and nothing to construe in respect to post-expiration contractual obligations. 3/

In Greenfield, as here, there was a general retroactivity clause. The Examiner refused to read such a clause to retroactively confer arbitration rights for disputes arising during the hiatus period. The Examiner reasoned as follows:

In considering this claim, it must be noted that the Association does not claim that the parties ever expressly agreed to such a result. To the contrary, since the Association concedes that the parties did not even discuss this issue, it is clear that the Association's claim rests entirely on the theory that the parties have implicitly agreed to the position it now advances. Absent such discussions, it is inherently implausible that the parties intended for such retroactivity when it is remembered that the Association's November 5, 1975 amended complaint on this very issue was pending before the Commission at the time that the contract

---

3/ cf. Gateway V.T.A.E. (14142-A, B) 1/27/77.

> was agreed to. For, if both parties in fact mutually intended that the grievance-arbitration procedure should be retroactive, it is only reasonable to assume that they would have at least discussed a possible withdrawal of the Association's complaint allegation regarding the District's refusal to arbitrate. As the record here fails to establish that there were such discussions, it is reasonable to infer the parties never intended that the retroactivity provision would encompass the issues raised in the Association's then pending complaint. Indeed, this point is reflected by Gibson's own testimony to the effect that he "had no understanding and that the question never came to my mind" as to whether the arbitration provision would be retroactive. Moreover, in considering the Association's claim, it must be remembered that the District has a statutory right to refuse to arbitrate such grievances arising out of the contractual hiatus. Since a waiver of such statutory rights must be clear and unequivocal, and because no such waiver here exists, there is no basis for finding that the District has waived its statutory right to refuse to arbitrate such grievances. Accordingly, it must be concluded that there was no mutual agreement under which the retroactivity proviso would provide for arbitration of grievances arising during the contractual hiatus.

On this issue, the Examiner and the Commission parted company. While sustaining the Examiner on the abrogation of the arbitration provision during the hiatus period, the Commission specifically disavowed the Examiner's conclusion relative to the effect of the general retroactivity provision.

> We do not rely on the Examiner's rejection of the Association's argument that the successor agreement applied to the hiatus retroactively. The merits of that argument belong to the arbitrator contracted for in the collective bargaining agreement. We here decide the scope of the duty to bargain, not the meaning of the successor agreement.

Here, the Union contends that the parties agreed to apply the language provisions of the contract retroactively. That is alleged to have the effect of contractualizing the layoff clause and of making grievances arising during the hiatus subject to arbitration. The District disputes the contention. This dispute is over the interpretation and application of the general retroactivity provision of the successor labor agreement.

Based upon the Commission's decision, I believe that the applicability of the retroactivity provision to the arbitration clause is a question properly before a grievance arbitrator.

Dated at Madison, Wisconsin this 19th day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C Houlihan
William C. Houlihan, Examiner