STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

S.E.I.U., LOCAL 152, Complainant, vs. RACINE UNIFIED SCHOOLS, Respondent.	Case 65 No. 29906 MP-1343 Decision No. 19983-C

Appearances:

Mr. Mark F. Nielsen, Schwartz, Weber, Tofte and 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.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

Examiner William Houlihan having, on March 19, 1984, issued Findings of Fact, Conclusions of Law and Order with accompanying memorandum in the above-entitled proceeding wherein he concluded that the Respondent had refused to proceed to arbitration over the Bowen grievance under the parties' 1981-83 agreement and had thereby violated Sec. 111.70(3)(a)5, Stats.; and the Respondent having on March 23, 1984, timely filed a petition for Commission review of said decision, and the parties having filed briefs in support of and in opposition to said petition, the last of which was received on May 31, 1984; and the Commission having reviewed the record in the matter including the Examiner's decision, the petition for review and the briefs filed in support of and in opposition thereto, and being satisfied that the Examiner's Findings of Fact should be modified in part, that the Examiner's Conclusions of Law should be modified and reversed in part, and that the Examiner's Order should be reversed;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Commission affirms and adopts as its own the Examiner's Findings of Fact 1-14, 16-19, and 21.

1/ 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 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.

(Continued on Page 2)

B. That the Examiner's Findings of Fact 15 and 20 are modified to read as follows:

> 15. On March 30, 1982, the Respondent denied the grievance in writing stating: "Denied, proposed layoff procedure not grievable under old Agreement and best qualified employe was selected for the job. Grievance to be forward (sic) to District Grievance Committee." The Respondent's Grievance/Negotiating Committee denied the grievance on April 13, 1982.

1/ (Continued)

> 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.
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> (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.
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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

20. By letter dated June 7, 1982, Mr. Johnson responded to Complainant's letter as follows: "Thank you for your letter of May 13, 1982, concerning Charlotte Bowen. My position remains the same as outlined in my letter of May 10, 1982, therefore I must respectfully decline your offer."

C. That the Commission modifies the Examiner's Conclusions of Law to read as follows and, as modified, adopts them as its own:

MODIFIED CONCLUSIONS OF LAW

1. That the grievance arbitration provision of the District's July 1, 1979-June 30, 1981 agreement with the Racine Education Secretaries Association, which provision the Union became entitled to enforce upon the Union's certification as representative on June 16, 1981, did not require the District to submit the Bowen grievance to arbitration; that the District therefore did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., when it refused to submit that grievance to arbitration under that agreement.

2. That neither the Union's demands for arbitration noted in Findings of Fact 16, 17 and 19, nor the Union's Complaint filed in the instant matter constitutes a demand for arbitration of the Bowen grievance under the grievance arbitration provisions of the District's 1981-83 agreement with the Union; and that the District has therefore not been shown herein to have refused to arbitrate the Bowen grievance under said 1981-83 agreement or to have thereby violated Sec. 111.70(3)(a)5, Stats.

3. That the District did not commit a refusal to bargain within the meaning of Sec. 111.70(3)(a)4, Stats., by its refusal to submit the Bowen grievance to arbitration.

D. That the Commission reverses the Examiner's Order and adopts, instead, the following:

MODIFIED ORDER

IT IS ORDERED that the instant complaint be dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER
MODIFYING EXAMINER'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AND REVERSING EXAMINER'S ORDER

BACKGROUND

In the complaint initiating this proceeding the Union alleged that the District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 5, Stats., by refusing to submit the grievance of Charlotte Bowen to arbitration as required by the grievance arbitration provisions in a then expired 1979-81 agreement. The complaint further asserted that the grievance involved an alleged failure of the District to abide by a tentative agreement reached between the parties on new layoff procedure language and implemented by the Distict prior to the time the parties reached agreement on the balance of a 1981-83 agreement. Both the tentative agreement on layoff language and the alleged District violation thereof occurred after expiration of the 1979-81 agreement.

In response, the District denied certain allegations made by the Union and, in addition, alleged that the grievance arose during the hiatus period between collective bargaining agreements, that the implementation of a tentatively agreed-upon proposal in such a period did not make the proposal an agreement, and that the District was under no duty to arbitrate post-expiration grievances. The Union and the District waived evidentiary hearing on the complaint and submitted the matter to the Examiner on stipulated facts.

THE EXAMINER'S DECISION

Basing his decision on the Commission's decision in Greenfield Schools, Dec. No. 14026-B (WERC, 11/77), the Examiner implicitly concluded that the District had not violated Sec. 111.70(3)(a)4, Stats., by its refusal to arbitrate but explicitly concluded that the District had violated Sec. 111.70(3)(a)5, Stats., by refusing to proceed to arbitration on the question of whether the District conduct cited in the Bowen grievance constituted a violation of the newly agreed-upon 1981-83 agreement and its general retroactivity provision.

The Examiner noted that the Greenfield Schools decision was a Commission review of an Examiner's decision in which the Commission affirmed the Examiner's conclusion that the grievance procedure is a part of the status quo which an employer is statutorily obligated to maintain during the hiatus period, but that the duty to bargain does not similarly require the employer to follow the arbitration provisions of the expired collective bargaining agreement during the hiatus period. The (Racine Schools) Examiner concluded, however, that in Greenfield Schools "the Examiner and the Commission parted company" regarding the effect of a general retroactivity provision present in the successor agreement ultimately reached by the parties, and quoted the following language from footnote 3 at p.5 of the Commission's Greenfield Schools decision to reflect this disagreement: "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." Focusing on this quoted language, the Racine Schools Examiner concluded that: "the applicability of the retroactivity provision to the arbitration clause is a question properly before a grievance arbitrator."

THE PETITION FOR REVIEW

The District, in its petition for review, contends that the Examiner's conclusion that the District violated Sec. 111.70(3)(a)5, Stats., by not processing the Bowen grievance through arbitration is "erroneous as a matter of law and contrary to prior decisions of the Commission . . . ." According to the District, the present matter is indistinguishable from Greenfield Schools and affords no basis for a different result. Asserting that the Examiner's decision is based on a footnote which is at most dicta, the District concludes that the Commission in Greenfield Schools "did not entrust to the arbitrator the task of determining substantive arbitrability." The District also argues that (at least

until the Union's brief to the Examiner) the Union's claim of a right to arbitrate rested exclusively on the expired agreement and the status quo doctrine, not on the retroactivity clause of the successor agreement. According to the District, the rule that there is not a duty to arbitrate grievances arising during the hiatus period is well-established, and the Examiner's reading of Greenfield Schools would create an exception which would swallow this rule. It follows, according to the District, that the Commission should reaffirm Greenfield Schools by dismissing the complaint or, in the alternative, change the Greenfield Schools rule on a prospective basis only.

The Union opposes the petition for review and asserts that the Examiner's decision that the Bowen grievance be submitted to arbitration should be affirmed by the Commission. The Union asserts that the grievance arose after the District's implementation of the tentatively agreed upon layoff provisions and that the demand for arbitration was made after the signing of a successor agreement which included a broad retroactivity clause. Thus, according to the Union, the request for arbitration is appropriate on the facts of this case which presents "a dispute as to application of the agreement." In addition, the Union asserts that there are sound policy reasons to enforce the Union's request for arbitration since arbitration is generally recognized as the preferred forum for the resolution of labor disputes, and since denying public employes, who cannot legally strike, access to arbitration "effectively strips them of the power to exercise their fundamental political rights."

The District, in reply to the Union's arguments, urges that the Bowen grievance, at the time of its filing, questioned the layoff clause, not the duration clause which was not in existence at the time the grievance was filed. From this, the District concludes that: "Arbitration should not be compelled based upon a provision which was not even in existence at the time the grievance arose." In addition, the District argues that it "did not consent to nor did the parties intend to require arbitration of the instant grievance by agreeing to a successor agreement containing an earlier effective date." More specifically, the District argues that no request to arbitrate had been submitted to it as of the time the successor agreement was signed, that the District's response to the request to arbitrate was immediate and unequivocal in stating that there was no duty to arbitrate, and that the Union's response to the District was clearly based upon the expired and not upon the successor agreement. In addition, the District argues that its implementation of the layoff clause, in light of prior Commission case law and of the District's management rights, does not constitute an agreement to arbitrate disputes arising during the hiatus period. To conclude the Bowen grievance was arbitrable would, according to the District, improperly require an arbitrator to determine a grievance arising under several separate articles, only one of which had been implemented at the time the grievance arose. Finally, the District urges that the public policy considerations cited by the Union are not persuasive in light of prior Commission decisions.

DISCUSSION

While we agree with the Examiner that Greenfield Schools governs the Sec. 111.70(3)(a)4, Stats., refusal to bargain aspect of this case, we cannot agree with the Examiner's conclusion that a violation of Sec. 111.70(3)(a)5, Stats., has been proven on the record.

In Greenfield Schools the Commission squarely held that, "for . . . reasons peculiar to the wholly contractual nature of arbitration, the status quo that the MERA duty to bargain requires be maintained in effect following expiration of an agreement does not include a previously existing contractual commitment to arbitrate grievances." 2/ That holding controls herein and warrants an expressed conclusion of law that the District did not commit a unilateral change refusal to bargaining in violation of Sec. 111.70(3)(a)4, Stats., by its refusals to arbitrate the Bowen grievance. 3/ The Examiner appears to have reached the same conclusion, though he entered no formal conclusion of law to that effect.

2/ Dec. No. 14026-B at 7.

3/ The pleadings, proofs and arguments do not advance any other unilateral change refusal to bargain claims, and we therefore do not address any others.

The Commission also squarely held in Greenfield Schools, that "Unlike an arbitration provision, however, the grievance procedure comes within the rule that an employer must maintain the status quo . . . ." 4/ In the context of that Sec. 111.70(3)(a)4, Stats., obligation, the District's treatment of the Bowen grievance in the manner prescribed in the pre-arbitral grievance procedure steps of the 1979-81 agreement cannot be deemed an implicit agreement to arbitrate the grievance if it was not resolved in those pre-arbitral steps. We therefore find no merit in the Union's contention in that regard.

We turn therefore to the allegation that the District violated Sec. 111.70(3)(a)5, Stats., by its admitted refusals in response to the Union's demands for arbitration.

The Examiner concluded that the District had violated Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate the Bowen grievance in violation of the grievance arbitration provision of the 1981-83 agreement. Thus, at p.9 of his decision, the Examiner stated, "This dispute is over the interpretation and application of the general retroactivity provision of the successor labor agreement." The Examiner's conclusion therefore implies an implicit finding or assumption that the Union has been shown to have demanded arbitration in a manner sufficient to invoke the arbitration provisions of that 1981-83 agreement.

For the following reasons we find that assumption unfounded on the instant record.

The Union filed the Bowen grievance on March 23, 1982, which the District responded to on March 30, 1982, stating: "proposed layoff procedure not grievable under old Agreement . . . ." The first Union response of record to the Board's denial of the Bowen grievance occurred on April 20, 1982, the day after the parties had ratified and executed a successor agreement to the expired 1979-81 agreement. On April 20, the Union sent a letter to the Commission requesting "a list of arbitrators to select from in the (Bowen) matter . . . ." In a letter dated May 4, 1982, the Union notified the District of its strikes and of its desire to have the District also strike arbitrators so that a hearing could be scheduled. In a letter dated May 10, 1982, Johnson responded and informed the Union: "It is my belief that the District has no obligation to arbitrate this grievance unless the contract provides for continuing obligation beyond its expiration date. In this case it does not." In a letter dated May 13, 1982, counsel for the Complainant informed Johnson that: "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." Johnson, in a letter dated June 7, 1982, informed counsel for Complainant that: "My position remains the same as outlined in my letter of May 10, 1982 . . . ." Thus, the issue, joined by the parties during the processing of the Bowen grievance, focused not on the 1981-83 agreement, but on the 1979-81 agreement.

We also find no merit in the notion that the Union's complaint itself constituted a demand for arbitration under the 1981-83 agreement that was subsequently refused by the District.

For the foregoing reasons, we conclude that the record evidence does not support the conclusion that the Union demanded arbitration of the Bowen grievance under the 1981-83 agreement arbitration provisions or, therefore, the conclusion that the District has been shown herein to have refused a demand to arbitrate that matter under the 1981-83 agreement. Thus, we conclude that the Examiner erred by finding such a refusal to have occurred, and we have accordingly modified and reversed his Conclusion of Law and reversed his Order. The Findings of Fact have also been expanded to set out additional factual background relevant to our ultimate conclusion that the District has not been shown herein to have been presented with or therefore to have refused a demand to arbitrate the Bowen grievance under the 1981-83 agreement.

4/ Dec. No. 14026-B at 6.

The distinction we are drawing between the Union's demand for arbitration in this matter and a demand for arbitration under the 1981-83 agreement is more than a merely technical one. For, in the face of Union counsel's own May 18, 1982, characterization of its demand as one under the "old agreement", we feel foreclosed from construing that demand more broadly. While the District did not specifically inquire whether the Union was advancing a claim under the 1981-83 agreement, its May 10, 1982, letter did invite the Union to "suggest reasons which would be persuasive" as to the District's obligation to arbitrate after stating that the Union's claim under the 1979-81 agreement did not justify the Union's request for arbitration. The Union's failure, in its reply, to expressly notify the District that it was also advancing a claim under the 1981-83 agreement left the parties' correspondence on the matter focused solely on the availability of arbitration under the 1979-81 agreement. As a result, there was no discussion regarding the impact of the successor agreement on the grievance or of the effect of the general retroactivity clause. In the circumstances, then, the Union cannot claim that its May 18, 1982, characterization was of no consequence whatever in the matter.

We agree with the Examiner that the arbitration provisions in the 1981-83 agreement would require the District to arbitrate whether the general retroactivity clause of that agreement applies to the District conduct cited in the Bowen grievance, and, if so, to arbitrate the merits of the Bowen grievance. The first of those issues is a claim which on its face is governed by the terms of the 1981-83 agreement, and hence a matter within the scope of the obligation to arbitrate undertaken by the parties by their agreement to the 1981-83 agreement arbitration clause. If the arbitrator were to answer that first issue in the affirmative, it would follow that the second issue is also a claim that is governed by the terms of the 1981-83 agreement, and hence one the District is required to arbitrate under the 1981-83 agreement. As noted above, however, the District has not been shown to have been requested to arbitrate those questions under the 1981-83 agreement. Thus, while the Examiner's reading of footnote 3 at p.5 of Greenfield Schools as the controlling case law rule was an apt one, the record evidence does not warrant the Examiner's treatment of the Union's demand for arbitration herein as inclusive of a demand to arbitrate under the 1981-83 agreement.

There remains the question of whether the District had a duty to arbitrate the Bowen grievance under the expired grievance arbitration provision of the 1979-81 agreement. We are aware of the broad sweep of the United States Supreme Court's Nolde Brothers 5/ opinion regarding the scope and nature of post-expiration arbitration obligations flowing from expired arbitration provisions in private sector commerce relationships. Whether a similar approach is warranted in the face of the differences between the public and private sectors, especially where binding interest arbitration is available, is an open question, but one we need not and do not address herein. For, whatever post-expiration grievance arbitration obligations, if any, the District was under by reason of the arbitration clause of the expired 1979-81 agreement, that obligation would not include arbitrating the Bowen grievance which involved a contractual provision that was never in existence during the term of the 1979-81 agreement.

The 1979-81 collective bargaining agreement had expired on June 30, 1981. Although the parties agreed to continue the wage and fringe benefit provisions of the expired agreement pending negotiations, there was no agreement to continue all terms of the expired collective bargaining agreement. The Bowen grievance arose on March 23, 1982, after a tentative agreement on a layoff provision had been reached by the parties and implemented by the District, but before complete accord on a successor bargaining agreement had been realized.

Thus, the Bowen grievance was one alleging a violation of a layoff provision that was not agreed upon or in effect at any time prior to the expiration of the 1979-81 agreement. Neither Nolde Brothers nor any other authority in any sector

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5/ Nolde Bros., Inc. v. Local 358 Bakery and Confectioners Workers Union, AFL-CIO, 430 U.S. 243, 94 LRRM 2753 (1977) (grievance arising after agreement expiration held arbitrable under expired agreement arbitration provision, as to the question of whether the expired agreement was intended to cover post-expiration events.)

of which we are familiar would warrant a conclusion that an unextended arbitration provision of a previously-expired agreement requires arbitration of such a claim in such circumstances.

For all of the foregoing reasons, we have reversed the Examiner's order and dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 31st day of January, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner