STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of NORTHLAND PINES SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b) Wis. Stats., Involving a Dispute Between Said Petitioner and WEAC UNISERV COUNCIL NO. 18	Case XXIV No. 30432 DR(M)-252 Decision No. 20140

Appearances:

Mr. John L. O'Brien, Drager, O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, Arbutus Court, Box 639, Eagle River, Wisconsin 54521, appearing o behalf of the District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of WEAC.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Northland Pines School District having, on September 23, 1982, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling, pursuant to Sec. 111.70(4)(b), Stats., as to the District's duty to bargain with WEAC UniServ Council No. 18 with respect to the latter's proposal relating to a subcontracting; and the District having, on November 1, 1982, filed a Statement in Support of said petition; and WEAC having, on November 8, 1982, filed a response thereto in which it modified the disputed proposal; and the District having on November 11, 1982 informed the Commission and WEAC that it objected to the modified proposal; and the parties having waived hearing and further written arguments; and the Commission, having considered the matter, makes and issues the following

FINDINGS OF FACT

1. That the Northland Pines School District, herein the District, is a municipal employer having offices at Eagle River, Wisconsin.

2. That WEAC UniServ Council No. 18, herein WEAC, is a labor organization having offices at 25 East Rives Street, Rhinelander, Wisconsin.

3. That during collective bargaining between WEAC and the District over the terms of a 1982-1983 contract covering certain employes of the District for whom WEAC is the collective bargaining representative, WEAC submitted the following proposal:

> That subcontracting be limited to not reducing positions to any less than the current number of full time equivalency bargaining unit positions and that this be incorporated into Article VIII, Board Functions, page 6.

4. That following the filing of the instant petition, WEAC subsequently modified said proposal during bargaining to read as follows:

> The union recognizes that the Board has . . . the right to subcontract, provided it does not cause a layoff in the current work force;

5. That WEAC, on November 8, 1982, modified its subcontracting proposal to read as follows:

> The Union recognizes that the Board has the right; subject to the provisions of this Agreement, to manage and operate the school system, including the selection and

direction of the work force; the right to plan, direct and control the lunch and custodial activities; the right to assign workloads and to determine the work force complement; the right to create, combine or eliminate positions; the right to establish and require observance of rules and regulations; the right to reprimand, discipline, suspend and discharge employes subject to the other provisions of this Agreement; and the right to subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and further provided that no present employes shall be laid off or suffer a reduction of hours as a result of subcontracting.

The foregoing enumeration of functions shall not be deemed to exclude other lawful functions of the Board, not specifically set forth, and the Board shall retain all functions granted to it by law, subject to the terms and provisions of this Agreement and the Board's obligations under sec. 111.70, Stats.

6. That on November 11, 1982 the District notified the Commission and WEAC that it believed the revised proposal to be permissive; and that it desired the Commission to resolve the dispute through issuance of a declaratory ruling.

7. That the Union's modified proposal, as set forth in Finding of Fact 5 primarily relates to wages, hours and conditions of employment of the employes represented by WEAC.

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

CONCLUSION OF LAW

1. That the subcontracting proposal set forth in Finding of Fact 5 relates to a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

On 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 Northland Pines School District has a duty to bargain within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act with WEAC UniServ Council No. 18 with respect to the latter's proposal relating to subcontracting as set forth in Finding of Fact 5.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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. (Continued on Page 3)

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.

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

In its petition and subsequent arguments, the District argues that WEAC's various subcontracting proposals all impermissibly interfere with the District's right to make a subcontracting decision. In this regard the District's Statement in Support of Petition contains the following arguments:

> These decisions of the Wisconsin Supreme Court, and the Wisconsin Employee Relations Commission, all hold nothing more than, the Board has the obligation to bargain the decision as to whether or not to subcontract and, further, has a duty to bargain the impact, or effect of such a decision. Nowhere is there any authority that says the Board has the obligation to bargain the right to make that decision. The language proposed by the union, in its final offer, would restrict the right of the Board to make the decision as to whether to subcontract janitorial services which is far different than negotiation on the decision itself, or the effects of the decision.
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> The mediation/arbitration law in Wisconsin, contains provisions for binding arbitration. Thus, if the mediation process in which the parties are presently engaged is unsuccessful, and if the union's language is permitted to remain in its final offer, the right to make the decision whether to subcontract work is effectively taken away from the Board. This is clearly contrary to the bases on which the Wisconsin Supreme Court made its decision in Racine, Supra. As part of its reasoning in reaching the conclusion it did, the Court there stated, at page 733:
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> > "In addition, this Court has repeatedly stated that the duty to bargain collectively does not require the school board to reach any agreement with the union. (citing cases) Indeed, sec. 111.70(1)(d), Stats., contains an explicit provision to that effect. Because the school board is under no obligation to accept the union's proposal, it cannot be said that collective bargaining unconstitutionally dilutes the votes of the remainder of the public."
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> Conversely, the mediation/arbitration process effectively does require a school board to reach agreement with the union. Thus, the right to make the decision becomes part of the mediation/arbitration process, because of inclusion in a final offer, the power to make the decision is taken away from the board, and, thus, is taken away from the public. Clearly, this is contrary to the intent of the Legislature and contrary to the bases for the decision of Racine, Supra.

WEAC contends that the District's view of the law is incorrect and that the distinction between the right to make a decision and the decision itself is non-existent. In any event WEAC notes that its last revised proposal mirrors language found mandatory by the Commission in City of Oconomowoc 18724 (6/82).

WEAC has indeed modified its subcontracting proposal to contain language which the Commission has previously found to be mandatory. The Commission sees no reason to depart from that holding here. As indicated in City of Oconomowoc, supra, unions are free to attempt to protect the work of the employes they represent from subcontracting by their employer. While the District acknowledges a duty to bargain the decision to subcontract under Unified School District No. 1 of Racine County v. WERC, 81 Wis 2d 89 (1977), it apparently feels that a union cannot seek to preclude such action by contractual language. In essence, the District argues that it will bargain over the decision as long as it retains the

right to subcontract. If the law were as the District contends, bargaining over the decision would be an empty shell with the foregone conclusion that subcontracting could occur. Instead, the collective bargaining process provides the union with the opportunity to seek protections in this area and the employer with the opportunity to establish its right to subcontract. Contrary to the District's contention, the existence of mediation/arbitration to resolve impasses does not alter the District's legal obligation to bargain in good faith upon mandatory proposals.

Dated at Madison, Wisconsin this 3rd day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner

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