STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MORAINE PARK SUPPORT STAFF ASSOCIATION/WISCONSIN EDUCATION ASSOCIATION COUNCIL,	
Complainant,	Case XV No. 31048 MP-1436 Decision No. 20429-A
vs.	
MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT,	
Respondent.	

Appearances:

Mr. Gordon E. McQuillen, Attorney at Law, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant.

Foley and Lardner, Attorneys at Law, by Mr. F. Roberts Hanning, Jr., First Wisconsin Center, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on January 24, 1983, alleging that the above-named Respondent had committed prohibited practices in violation of Sections 111.70(3)(a)1 and 111.70(3)(a)4, Stats.; and the Commission having on March 16, 1983, appointed Andrew Roberts, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in 111.07(5), Stats.; the matter having then been set for hearing on May 3, 1983, but the parties on April 30, 1983, having agreed to postpone the matter pending receipt of an arbitration award in a related contractual grievance; and said arbitration award having been issued by Arbitrator Zel Rice on January 11, 1984; and hearing on the matter herein having been rescheduled to March 21, 1984, but the parties having jointly submitted stipulated facts and issue on March 23, 1984 in lieu of hearing; and the Complainant having amended its complaint to strike the alleged violation of Sec. 111.70(3)(a)1; and the parties having submitted briefs by June 12, 1984; and the Examiner, having considered all of the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant is a labor organization with its offices located at 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin.

2. That the Respondent is a municipal employer which operates a vocational, technical and adult education system with its offices located at 235 North National Avenue, Fond du Lac, Wisconsin.

3. The Complainant and the Respondent were at all times material herein parties to a 1981-1983 collective bargaining agreement which contains the following pertinent provisions:

Article II

Rights Clause

Section 2.01 - Management Rights

Except as otherwise expressly provided in this Agreement, the management of the District and the direction of all personnel is vested exclusively in the District, including but not

limited to the right to discharge, suspend, or otherwise discipline an employee for just cause; the right to establish, revise, and delete policies, procedures, regulations, and reasonable work rules; the right to lay off for lack of work or other legitimate reasons; the right to transfer, promote, demote, or otherwise assign employees to work; and the right to determine hourly and daily schedules of employment. The District shall be the exclusive judge of all matters relating to the conduct of its business, including but not limited to the buildings, equipment, methods, and materials to be utilized.

Nothing in this Agreement shall limit in any way the District's contracting or subcontracting of work or shall require the District to continue in existence any of its present programs or operations in its present form and/or location or on any other basis.

If the hours of employment of Group A or B employees are affected, the District will notify the Association thirty (30) days in advance.

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Article IV

Status of Employees

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Section 4.05 - Layoff

In the event it becomes necessary to reduce the number of employees on the staff in an occupational skill group in the District, the following procedure, except as required to meet Affirmative Action goals, shall be used:

1. To the extent feasible, a reduction in staff shall be accomplished through normal attrition.

2. If the necessary reduction cannot be achieved through normal attrition, then probationary employees shall be laid off providing the remaining employees are qualified to perform the available work in the appropriate occupational skill group in the District.

3. If further reduction in the staff is necessary, then Group B and C employees will be laid off in the reverse order of their length of seniority in the District, provided the remaining employees are qualified to perform the available work.

4. If further reduction in the staff is necessary, then Group A employees will be laid off in reverse order of their length of seniority provided that the remaining employees are qualified to perform the available work.

5. Notwithstanding the foregoing, employees with less seniority than others, but with special skills not possessed by employees with more seniority, may be retained while the employee with more seniority is laid off.

6. An employee whose job is eliminated shall have the right to bump an employee with less seniority within the same or lower job classification provided that the employee is

qualified to perform the available work. Employees who are bumped are also entitled to use the same bumping process.

Such bump must be exercised within five (5) days after the employee is notified that his/her job will be eliminated or has been bumped. Only three (3) bumps may occur for each layoff within an occupational skill group.

. . .

Article XII

Waiver

Section 12.01 - Waiver

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 or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the District and the Association, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement. Nothing in this provision, however, shall prevent modification of this Agreement at any time by mutual written consent of the parties.

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Article XIV

Grievance Procedure

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Section 14.03 - Steps of Procedure

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Step 5

If not satisfied with the Step 4 answer, the Association may in writing refer to arbitration any grievance concerning interpretation or application of this Agreement. Any grievance not so referred by the Association within ten (10) days after its receipt of the Step 4 answer shall be considered withdrawn.

. . .

4. That during the 1981-1982 academic year, the Respondent experienced a budget deficit; that as a result the Respondent's District Director John Shanahan asked employes to make suggestions about where cost-savings could be effected; that the employes responded with a number of suggestions; that on February 18, 1982, District Director Shanahan presented the following as part of a cost saving recommendation to the Respondent's Board at its regularly scheduled public meeting:

1982-83 CALENDAR

Recommendation:

Close the FDL, BD, and WB Campuses on Friday, December 24, 1982, and open facilities on Tuesday, January 4, 1983.

. . .

Support Staff:

All part and full-time support staff will be off from the end of the workday December 23, 1982, until the beginning of the workday on January 4, 1983, with the exception of those needed for minimum maintenance of facilities and security.

Group A & B employees that are eligible will have:

Dec. 24, 1982, will be a paid holiday.
Dec. 25, 1982, will be a paid holiday.
Dec. 31, 1982, will be a paid holiday.
Jan. 1, 1983, will be a paid holiday.
Dec. 27, 28, 29, 30, 1982, and Jan. 3, 1983, will be non-paid vacation days. No vacation days can be taken during this time.

that the Respondent's Board at said meeting directed Shanahan to proceed with said recommendation; and that because of paid holidays during the recommended shutdown period, December 28, 29 and 30, 1983 would be non-paid, non-work days for the employes involved herein.

5. That the next day Shanahan sent the following memorandum to the Respondent's employes:

To: All Moraine Park Staff

From: John J. Shanahan
District Director

Date: February 19, 1982

Subject: 1982-83 Budget

About two weeks ago, I held several informal meetings, to which you were invited for an explanation of budget problems faced by the District for the 1982-83 fiscal year. Personnel costs will increase approximately $800,000 for the same staff employed for 1981-82. Requests for new staff have been reduced by the Executive Committee, but positions remaining would still require another $350,000.

In order to reduce the impact on the property tax to meet these increases, the Board has asked me to take action on cutting costs without reducing educational services to any great extent. The first step would be to close all facilities in the District from the end of the workday, December 23, 1982, to the beginning of the workday, January 4, 1983, except for a few required employees.

Second, Federal Project staff and instructors with 240 or over workdays will be reduced to 237 days unless you have already received notice of a greater reduction.

Third, Management Staff increases will be studied by the Board with tentative action planned for the March regular Board meeting.

Fourth, Mr. Henry Hinrichsen will be notifying employees of the details for submitting requests for flextime summer schedules and voluntary leaves of absence without pay.

I will be communicating with you further as we move through the budget process.

that at the next monthly public meeting of the Respondent's Board on March 18, 1982, a document entitled: "1982-1983 Budget Planning Recommendations" was distributed and made available to anyone who wished to have a copy; that said document included the above-described recommendation to close the facility during the 1982-1983 Christmas recess; and that Complainant's President, Cheryl Quiring, received a copy of said Budget Planning Recommendations.

6. That Dr. John W. Coe, consultant for the Complainant, wrote a letter dated November 12, 1982, to Shanahan, which stated as follows:

Dear Mr. Shanahan:

I represent the Moraine Park Support Staff Association. It has come to my attention that District intends to close the facility as stated in the attached memorandum.

I am interested in finding out what the impact will be on the employees in the unit as a result of this decision. As such, I have several questions regarding this decision.

1. Does the District intend to pay the employees for this time? If not, will the District pay some of the employees? If so, who are they? What is their position on the seniority list?

2. What sort of circumstances have prompted the District's decision? For example, is the District declaring a financial emergency, and if so, why?

   It is my understanding that the District budget has been set for 1982-83. Therefore, what does the statement "reduce the impact on the property tax" mean in the context?

I would like to discuss these issues with you in the hope that we can avoid time consuming and expensive litigation. I look forward to your response.

Sincerely,

JACK COE
Higher Ed Consultant

that Shanahan then responded to Coe with the following November 19, 1982, letter:

Dear Mr. Coe:

This letter is in response to your letter of November 12, 1982 regarding the closing of MPTI District facilities beginning at the end of the workday December 23, 1982 to the beginning of the workday on January 4, 1983.

Firstly, this period is specifically identified as shut-down time and employees will not be paid for this period. Furthermore, there are no employees who are considered as exceptions to this shut-down unless an emergency situation should develop relating to facility maintenance or equipment operation. No individuals have been identified to be scheduled if such a situation should occur.

Secondly, due to the fact that students are not in attendance during this shut-down period, it is the opinion of the District Board that the facilities could be closed without negatively impacting the mission of the District in providing vocational, technical and adult education. I would like to note that all salaries of support staff employees for this period were removed from the budget.

In conclusion, it is easy to ascertain that, with the closing of facilities for this period of timed, significant decreases in the operational cost of the District will be realized. In addition, this decrease impacts that District taxpayers in a positive tax savings manner.

I trust this response has sufficiently answered the questions referenced in your letter.

Sincerely,

John J. Shanahan
District Director

that Coe then responded in a November 29, 1982, letter as follows:

Dear Mr. Shanahan:

Thank you for your letter of November 19, 1982, which answered the questions that I had regarding the shutdown. In response, this particular decision has a negative impact on the wages, hours, and conditions of employment of affected employees, an impact that we had not anticipated during the negotiations of the present collective bargaining agreement. Accordingly, I request opening up bargaining, limited to the discussion and possible resolution of the impact on our bargaining units created by the Board decision to shut down the facility . It is my view that this is a new subject of bargaining and, therefore merits reconsideration by the Board.

It is my hope that lengthy litigation may be avoided by this process.

Sincerely,

JOHN W. COE, Ph.D.
Higher Ed Consultant

that Shanahan then responded to Coe in a December 8, 1982, letter as follows:

Dear Mr. Coe:

This letter is in response to your letter of November 29, 1982, in which you requested that bargaining be opened upon to discuss the closing of MPTI District facilities beginning at the end of the workday on December 23, 1982, to the beginning of the workday on January 4, 1983. Contrary to your view, the District does not consider this matter to be a new subject of bargaining about which the Moraine Park Support Staff Association is entitled to negotiate at this time.

First, the current Bargaining Agreement between the District and the Association expressly gives the District the authority to make the decision on question. Section 2.01 provides:

> "Except as otherwise expressly provided in this Agreement, the management of the District and the direction of all personnel is vested exclusively in

the District, including but not limited to . . . the right to determine hourly and daily schedules of employment."

The decision to shut down the District facilities for the period in question clearly falls within this contract provision.

Second, the Bargaining Agreement provides in Section 12.01 that:

> "(T)he District and the Association, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement." (Emphasis supplied)

This contract provision clearly applies to your request to negotiate. Thus, the District believes that no aspects of the shut-down decision are, or should be, subject to negotiations between the parties. To argue otherwise would be to ignore the clear language of this provision, language to which the Association freely agreed.

Third, the decision to close the facilities for the period in question was announced to the members of the Association's bargaining unit on February 19, 1982, in an interoffice correspondence sent to all District personnel. Even if any aspect of the decision was subject to negotiation (which it is not), the proper time to request bargaining would have been when the decision was being made. This is particularly true in the case of a budgetary decision which must be considered in effect when the budget process is finalized and not when the event contemplated by the budget occurs months later. Any discussions between the parties that might have had an impact on the decision could have only appropriately occurred when the decision was being formulated and not more than nine months after the decision was formally adopted.

In conclusion, the District's position is that the decision in question does not present any new subject of bargaining. Furthermore, it is considered inappropriate for the Association at this late date to assert a bargaining right that it does not possess by either contract or law. The District, therefore, respectfully declines your request to open up bargaining on any aspect of this decision.

Sincerely,

John J. Shanahan
District Director

7. That the Respondent's facilities were shut down at the end of the working day of December 23, 1982, and reopened with the start of the working day on January 4, 1983; that the eligible support staff employes received holiday pay for December 24, 27 and 31, 1982, and January 3, 1983, but support staff employes were not paid for December 28, 29 and 30, 1982, which were days such employes would otherwise have worked and been paid for; that because the employes were not paid for said days, the Complainant filed a grievance, which the Respondent denied, and the matter was then arbitrated before Arbitrator Zel Rice; that Arbitrator Rice framed the pertinent issue as follows: "Did the Employer violate the collective agreement when it shut down on December 28, 29 and 30, 1982 and did not pay employes for those days? If so, what is the remedy?"; and that Arbitrator Rice's Award, dated January 11, 1984, denied the grievance in pertinent part as follows:

> The arbitrator finds that the shut down of the facility constituted a lay off subject to section 4.05 of the collective bargaining agreement. The implementation of the lay off was in accord with the requirement set forth in Section 4.05 of the collective bargaining agreement. Since all support staff personnel ceased and resumed work on the same work dates, the order of lay off, bumping rights and recall procedure in Section 4.05 were inoperative with respect to the shut down and no employe can be considered to have been given a lay off or recalled before a lower class or less senior employe or to have any basis for exercising bumping rights. . . .
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> . . . There is nothing in Section 4.05 or any other provision of the collective bargaining agreement which prevents the Employer from giving layoffs to all employes at one time.

8. That when the Respondent closed its facilities from the end of the workday on December 23, 1982, to the beginning of the workday of January 4, 1983, and in connection therewith scheduled December 28, 29, and 30, 1982, as non-paid, non-work days for the Respondent's support staff personnel, such decision resulted in the layoff of all support staff personnel; and that impact items relating to wages, hours, or conditions of employment with respect to said layoff are contained in the 1981-1983 collective bargaining agreement.

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

CONCLUSION OF LAW

1. That the Respondent has no duty to bargain collectively with the Complainant with respect to the impact of its decision to close its facility from the end of the workday of December 23, 1982 to the beginning of the workday on January 4, 1983, with respect to the wages, hours and working conditions of the support staff within its employ represented by the Complainant, and consequently the Respondent did not violate Sec. 111.70(3)(a)4, Stats.

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

ORDER 1/

It is ordered that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts
Andrew Roberts, 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
> (Footnote One continued on Page Two)

1/ (Continued)

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, CONCLUSION OF LAW AND ORDER

BACKGROUND

After issuance of Arbitrator Rice's Award, the parties jointly submitted the following issue for decision herein:

> Is the Association legally entitled to a Wisconsin Employment Relations Commission order requiring the District, upon request of the Association, to bargain with the Association concerning the effects of the District's decision to totally close its facilities from the end of the workday, December 23, 1982, to the beginning of the workday, January 4, 1983, and, in connection therewith, to schedule December 28, 29 and 30, 1982 as non-paid, non-working days for the District support staff personnel represented by the Association? 2/

COMPLAINANT'S POSITION

At the outset, the Complainant maintains it had the right to bargain the shutdown itself; however, the Complainant then, as now, seeks only to bargain the impact of that decision. In that regard the Complainant contends that it timely demanded that the Respondent bargain the impact of its decision to shut down the facilities during the 1982-1983 Christmas recess. The Complainant argues the agreement is silent with regard to a complete shutdown, suggesting it does not address the effects of a shutdown on vacation days, earned sick leave, lost retirement benefits, and lost wages. The Complainant maintains it did not waive its right to bargain the impact of a shutdown decision through the waiver clause in the bargaining agreement because at the time the parties reached agreement on the 1981-1983 contract the Complainant was not aware of the impending shutdown. According to the Complainant, no other provisions in the agreement acted as a waiver. The Complainant therefore asks that the Respondent be ordered to bargain over the impact of its decision to shut down, noting that even though the closing occurred many months ago, bargaining is viable to recover any lost wages or benefits.

RESPONDENT'S POSITION

The Respondent contends that the school closing and its impact were already addressed in the bargaining agreement, pointing to the management rights, layoff, and waiver provisions. Moreover, the Respondent argues the Complainant did not respond to the closure decision with a bargaining request in a timely manner, and accordingly, both through the bargaining agreement and the Complainant's inaction, it waived any duty to bargain over the school closing.

DISCUSSION

Arbitrator Rice found that scheduling the three days off without pay for all the bargaining unit employes was a layoff. The Examiner agrees such action was a layoff of all bargaining unit employes during said period. Section 4.05 states, "In the event it becomes necessary to reduce the number of employees on the staff in an occupational skill group in the District, the following procedure . . . shall be used. . . ." Because of budget constraints the Respondent determined it was "necessary to reduce the number of employes on the staff." As Arbitrator Rice noted in his award, the reduction included every employe in the bargaining unit so that it was not necessary to follow the layoff procedure to determine which employes would be laid off. 3/

2/ As stated in the parties' Stipulation of Issue and Evidence, filed March 23, 1984.

3/ Joint Exhibit No. 3 at pages 10-11.

The question before the Examiner is therefore the duty to bargain the effects of the layoff. The impact of a layoff decision on wages, hours and conditions of employment has long been held to be a bargainable issue. 4/

During the term of the bargaining agreement, an employer has the duty to negotiate those issues which are mandatory subjects of bargaining when the Union has properly requested it to do so, unless the parties have waived bargaining over the subject or unless the parties have already bargained over the subject and it is encompassed in the agreement. 5/ The Complainant argues that the impact of the shutdown includes such bargainable issues as lost wages and benefits. However, unless it can be shown that impact items have not been included in the collective bargaining agreement, then the Respondent has met its duty to bargain such items. In Racine Unified School District, 6/ the employer had undertaken an extensive reorganization, and the Association argued the employer had a duty to bargain its impact. The Commission there held:

> The Association contends that the District has a duty to bargain with it concerning the impact of the extensive reorganization plan implemented by the District. It argues that the impact of the reorganization is of a far greater magnitude than that contemplated in the provisions of the present labor agreement and that, as a result, certain aspects of the impact are not addressed by said agreement.
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> . . .
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> . . . The issue, herein as it relates to the impact of the reorganization plan on teacher wages, hours and working conditions, concerns itself with whether the Association has waived its right to bargain thereon, by virtue of any of the provisions existing in the 1979-82 collective bargaining agreement.
>
> During the course of this proceeding the Association has failed to establish any particular "impact item" which is not included in the existing collective bargaining agreement. As set forth in the Findings of Fact, various provisions relate to layoff, recall, transfers, and assignments of teachers and the impact thereof on wages, hours and working conditions. The fact that the Association, when such provisions were being negotiated, and/or the District were not aware that a particular managerial decision might have a greater impact than anticipated at the time, does not, in our opinion, constitute a valid basis for permitting the renegotiation of such provisions during the term of the agreement. We have concluded that under the circumstances herein, the District has no enforceable duty to collectively bargain on proposals relating to matters already included in the agreement, which matters pertain to the impact of the reorganization plan on wages, hours and working conditions of teachers.

Similarly, the Respondent here did not have an obligation to further bargain the impact of such a decision to close down the facilities because the collective bargaining agreement contained provisions relating to the impact of such a decision which included a layoff procedure (Article IV), wages (Article V) and benefits (Articles VI and VII).

The Complainant apparently suggests that a distinction should be drawn between when only a few employes are laid off and when the entire unit is. However, as would occur when only a few employes are laid off, the parties must

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4/ City of Brookfield v. WERC, 87 Wis.2d 819 (1979).

5/ Ibid.

6/ Dec. No. 18848-A (WERC, 6/82), at page 14.

look to the wage and benefit provisions to determine what effect the layoff will have on such matters. Any dispute over their application to the layoff herein must be left to the grievance/arbitration procedure (Article XIV). 7/

In sum, the Examiner has found that the parties have already bargained the impact of the shutdown which resulted in the layoff of all support staff employes because the collective bargaining agreement contains provisions for the layoff procedure, as well as the effect of the layoff on employes' wages and benefits. Therefore, the complaint has been dismissed in all respects.

Dated at Madison, Wisconsin this 24th day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts
Andrew Roberts, Examiner

7/ It should be apparent from the foregoing discussion that the parties have already bargained the impact of the shutdown, as found in the above-noted provisions of the labor contract. Therefore, it is unnecessary to determine the effect of Article XII, the Waiver clause, or the timeliness of the Complainant's request to bargain. Even if it had been necessary to consider the application of the waiver provision, such a blanket waiver would be restrictively construed. Deerfield Community School District, Dec. No. 17503 (WERC, 12/79), aff'd 80-CV-260 (CirCt Dane, 1/81).