STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of NORTHWEST UNITED EDUCATORS Involving Certain Employes of CLAYTON SCHOOL DISTRICT	Case IX No. 30888 ME-2170 Decision No. 20698

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Petitioner-Association, Northwest United Educators.

Mulcahy & Wherry, S.C., by Mr. Michael J. Burke, P. O. Box 1030, Eau Claire, Wisconsin 54702, appearing on behalf of the Employer.

Habush, Habush & Davis, S.C., by Mr. John S. Williamson, Jr., 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Intervenor-Union, Clayton Professional Educators, WFT-AFT, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL

Northwest United Educators having, on December 10, 1982, filed a petition requesting the Wisconsin Employment Relations Commission to conduct an election among certain employes of the Clayton School District to determine whether said employes desire to be represented by said Petitioner for the purposes of collective bargaining; and Clayton Professional Educators, WFT-AFT, having been permitted to intervene in the matter on the basis of its claim that it is the current bargaining representative; and the parties having agreed to address the threshhold question of the petition's timeliness by written argument and to waive hearing on said timeliness question; and briefs and reply briefs having been filed, the last of which was received on March 11, 1983; and the District having notified the Commission on March 25, 1983, that it did not desire to file a reply brief; and the Commission having considered the evidence and arguments of the parties and being fully advised in the premises makes and issues the following

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter NUE, is a labor organization and maintains offices at 16 West John Street, Rice Lake, Wisconsin 54868.

2. That the Clayton School District, hereinafter the District, is a municipal employer and maintains its offices in Clayton, Wisconsin 54004.

3. That Clayton Professional Educators, WFT-AFT, hereinafter WFT, is a labor organization and maintains its offices in Clayton, Wisconsin 54004.

4. That WFT and the District are parties to a collective bargaining agreement containing the following pertinent provisions:

> RECOGNITION
>
> The Board recognizes CPE as the exclusive certified bargaining representative on matters of wages, hours and conditions of employment for all certified teaching personnel including classroom teachers, teachers for exceptional children, librarians and regular part-time teachers employed by the District (hereinafter referred to as teachers) but excluding substitute teachers, principals, supervisors, non-instructional personnel such as nurses, social workers, office clerical, maintenance and operating employees, and all other employees employed by the Board or in the District.

DURATION

A. This agreement shall be effective as of July 1, 1982, shall be binding upon the Board, the Federation and the teachers, and shall remain in full force and effect through June 30, 1986.

B. 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 understandings and agreements arrived at by the parties after the Board and the Federation, 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, even through 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.

C. This agreement shall automatically be renewed from year to year and shall be binding for additional periods of one year unless either party gives written notice to the other not later than January 31, 1983 next prior to the aforesaid expiration date of this agreement of its desire to modify the agreement for a successive term or to terminate the agreement. For any other contract change complete prior agreement must be reached between the Clayton School Board and the Clayton Professional Educators, A.F.T., W.F.T.

D. The salary schedule will be the only negotiable issue for the 1983-1984 school year.

Executed this 27th day of September, 1982 at Clayton School by the undersigned officers by the authority of and on behalf of the Clayton Board of Education and the Clayton Professional Educators.

SAVINGS CLAUSE

If any article or part of this agreement is held to be invalid by operation of law, or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any article or part should be restrained by such tribunal, the remainder of the agreement shall not be affected thereby and the parties shall enter into immediate negotiations for the purpose of arriving at a mutual satisfactory replacement for such articles or part. Failing to agree on a replacement for such article or part shall not result in a work stoppage for the term of this agreement.

5. That on July 20, 1977, following an election conducted by the Commission, NUE was certified as the bargaining representative of the unit described as: "all certified teaching personnel, classroom teachers, teachers for exceptional children, librarians, regular part-time teachers (of the District), excluding substitute teachers, principals, supervisors and non-instructional personnel such as nurses, social workers, office clerical, maintenance and operating employes and all other employes; 1/ that following elections conducted by the Commission, WFT was certified as the bargaining representative in the same unit on January 24, 1979 2/ and again on March 13, 1981; 3/ that on December 10, 1982, NUE filed a Petition for Election in the same bargaining unit currently represented by WFT.

1/ (15615).

2/ (16715).

3/ (18454).

6. That sec. 111.70(3)(a)4, Stats., provides in pertinent part: ". . . The term of any collective bargaining agreement shall not exceed 3 years."

7. That WFT and the District contend, contrary to the NUE, that the petition is barred by a valid collective bargaining agreement, and therefore, is untimely filed; that NUE contends that the agreement's duration provision is illegal and void and therefore cannot bar this petition.

8. That properly interpreted the current collective bargaining agreement acts as an election bar as if it expired after three years on July 1, 1985.

9. That the contractual provision which permits the negotiation of salary issues for the 1983-84 year does not create a window period during which a petition for election could be timely filed.

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

CONCLUSIONS OF LAW

1. That the duration clause in Finding of Fact 4 effectively bars a representation election as if the contract expired July 1, 1985.

2. That the petition filed by the Northwest United Educators requesting the Wisconsin Employment Relations Commission to determine whether a majority of certified teaching personnel of the Clayton School District desire to be represented by the Association is untimely filed.

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

ORDER 4/

That the petition filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

4/ 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

(Continued on page four)

4/ (Continued)

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, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL

BACKGROUND AND POSITIONS OF THE PARTIES:

NUE initiated the instant proceeding by filing an election petition in the bargaining unit currently represented by WFT. NUE's main contention is that the petition is not barred by the contract and is therefore timely. It arrives at this conclusion by asserting the four-year duration clause is illegal because it extends beyond the three years provided for by sec. 111.70(3)(a)4., Stats., which states: "the term of any collective bargaining agreement will not exceed three years." It reasons further that the Commission must find that this contract has either an indeterminate duration or no duration at all. Since contracts of either no duration or indeterminate duration do not bar an election, this petition is timely filed.

NUE supports its argument that the four-year duration clause is illegal and void by comparing the Municipal Employment Relations Act, MERA with the National Labor Relations Act (NLRA). Under the NLRA, contracts exceeding three years in duration are not expressly prohibited by statutory language, but the National Labor Relations Board (NLRB), has established a policy that such contracts will not operate to bar an election for more than three years. Because MERA and NLRA are so similar in other respects in both the statutory language and their application, this specific difference regarding contracts exceeding three years must be given due weight and must not be overlooked. Therefore, the Commission is precluded from merely following NLRB policy and must determine that a four year duration clause is illegal and void.

NUE further argues that if the Commission were to treat the instant four year contract as if it were a three year contract, it would in effect be redrafting the contract and compelling the parties to agree to a specific contract modification. NUE points out that the agreement has a savings clause which requires the parties to renegotiate any clause found to be unlawful. However, the parties neither renegotiated the duration clause nor sought to begin renegotiation of said clause before the petition for election was filed. Finally, NUE argues that by interpreting this contract as if it had a three year duration, the Commission would thereby violate the statutory rights of employes by encouraging the parties to execute illegal contracts for more than three years in an attempt to prevent representation elections.

On a second line of argument, NUE asserts the January 31, 1983 date for opening negotiations on salary creates a 60-day window period when election petitions can be timely filed.

The District argues that the Commission should seek to harmonize this contract with MERA by giving effect to the first three years. It cites Muskego-Norway, 5/ for the proposition that statutes, should whereever possible be harmonized to reconcile any conflicts. Although the Court was dealing with conflicting statutes in the Muskego-Norway case, the principle of harmonization appropriately could be applied to a collective bargaining agreement which conflicts with MERA. Following this principle, the contract should be interpreted to have a valid duration clause which operates to bar an election at this time. The District asserts such an interpretation would be consistent with the NLRB policy first enunciated in General Cable 6/ that contracts with a fixed term in excess of three years will operate to bar elections for three years only. Additionally, this construction is supported by the NLRB policy of giving effect for purposes of contract bar, to agreements which contain substantial terms and conditions of employment. In a final argument in support of giving effect to three years of this contract, the District points to the Savings Clause, which provides that if any part of the contract be found invalid the remainder of the agreement shall not be affected thereby.

5/ 35 Wis. 2nd 540 (1967).

6/ 139 NLRB 1123, 51 LRRM 1444 (1962).

Turning to the issue of the reopener on salary for January 31, 1983, the District contends that a limited reopener does not create a window period for the purposes of an election, citing Wauwatosa 7/ and Durand 8/. It also cites a similar policy applied by the NLRB in Appalachian Shale Products Company 9/.

WFT first addresses the question of whether a reopener exists for January 31, 1983. Since paragraph C of the Duration Clause refers only to a limited reopener pertaining to salaries mentioned in paragraph D, WFT asserts that negotiations limited to wages do not lift contract bars, citing Deluxe Metal Furniture Company. 10/ Turning to the problem of the four year Duration Clause, WFT urges that the Commission should follow NLRB policy by determining that the contract bars an election for three years. WFT contends that the NLRB will not find that an illegal clause removes the contract as a bar to an election, unless the illegal clause undermines employes' free choice, citing Food Haulers, Inc. 11/. The WFT argues that so construing a contract exceeding three years to be a three year contract bar would not subvert the policies of the contract bar rules. WFT asserts that the NLRB policy actually is more subversive to employe rights than the proposed Commission policy, because it gives an incentive to negotiate a contract exceeding three years and then to file a petition for election at the end of three years. If the challenging labor organization is successful in the election, WFT reasons, the employes could choose between continuing the earlier contract or seeking to have a new representative negotiate a new contract. Under the NLRB policy, therefore, a successful challenging labor organization is in a more favorable position than an incumbent labor organization. In contrast, under MERA which makes contracts exceeding three years illegal, both the incumbent and the challenging labor organization are in the same position: they both may negotiate a new collective agreement at the end of the three year term. Finally, WFT urges the Commission to give effect to the contract bar during the three years, in order to maintain the integrity this provision of MERA which it asserts was designed to protect labor organizations against overbearing employers who might coerce them to agree to long contracts. It argues that any other application of this provision would punish and not protect labor organizations.

DISCUSSION:

The narrow issue before the Commission is whether a contract with a four-year duration clause operates to bar a petition for election. NUE argues that because sec. 111.70(3)(a)4., Stats., does not permit any collective bargaining agreement to have a duration in excess of three years, the Duration Clause at issue herein either disappears completely or becomes a duration of indeterminate length. In either event, according to this argument, the current contract would not act as a bar to an election.

NUE supports its assertion that MERA voids duration provisions exceeding three years by pointing to the difference between NLRA and MERA. However, NUE over-emphasizes the significance of that difference. While it is true that NLRA, unlike MERA, does not address the effect of contracts exceeding three years, the difference between the two statutes in this regard is not determinative herein. For the difference between the two statutes does not show legislative intent under MERA, to void, all duration clauses exceeding three years from their very first day. NUE's theory that duration provisions exceeding three years or of indeterminate length are void would add a sanction to the statutes which the Legislature did not express. That sanction would conflict with the general legislative emphasis on the desirability of voluntary agreement to and mutual adherence to the terms of a negotiated collective bargaining agreement. Hence, the Commission concludes that for purposes of an election petition, this contract will have the effect of a three-year contract.

7/ (8300-A) 2/68.

8/ (13552) 4/75.

9/ 121 NLRB 1160, 2 LRRM 1506 (1958).

10/ 121 NLRB 995, 42 LRRM 1470 (1958).

11/ 136 NLRB 394, 49 LRRM 1774 (1962).

Our determination that a contract bar exists is entirely consistent with the employes' statutory rights to choose their bargaining representative. The statute provides that employes and employers may agree to a three-year contract, thereby barring election during all but the window period coming at the end of the three years. 12/ This ruling leaves the parties to this contract in the same position that they would be in if they had agreed originally to a contract with a three-year duration.

In reaching this conclusion, the Commission is not redrafting the disputed duration provision but rather giving the maximum effect to its terms permitted by law. Hence the fact that the parties have failed to exercise the Savings Clause has no bearing on the Commission's interpretation in that regard.

Having found that the disputed duration provision can operate to bar an election, the Commission must consider whether any reopener clause lifts that bar. On first impression, it might appear that Paragraph C establishes January 31, 1983, for reopening negotiations on the entire contract. However, on closer examination, the inclusion of "1983" appears to be erroneous since it not only creates an unlimited reopener more than a year before the contract expires, but additionally, it lacks internal logic. The words "next prior to the expiration date" make the year "1983" superfluous as a means of identifying the year to which January 31 refers. WFT suggests that the parties erroneously inserted "1983" in Paragraph C instead of in Paragraph D because they intended January 31, 1983 as the date for the reopener limited to salaries provided for in Paragraph D. This explanation is both plausable and undisputed. Consequently, the January 31, 1983 date in Paragraph C does not lift the contract bar.

The Commission has previously concluded 13/ that limited reopener provisions do not lift contract bars since such provisions indicate a substantial and stable relationship between the parties which they are bound to maintain throughout the contract period. This policy appropriately insulates the relationship from challenges by rival organizations.

Dated at Madison, Wisconsin this 24th day of May, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

12/ Wauwatosa Board of Education, (8300-A) 2/68.

13/ Northlake Joint School District #7, (12829) 6/74 and Douglas County, (20608) 5/83.