STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of SCHOOL DISTRICT OF KETTLE MORAINE Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and the UNITED LAKEWOOD EDUCATORS	Case XIII No. 32433 DR(M)-332 Decision No. 21658

Appearances:

Mulcahy and Wherry, S.C., 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, by Mr. Michael L. Roshar, on 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

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DENYING MOTION TO DISMISS

On November 11, 1983, the School District of Kettle Moraine, herein the District, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., regarding the District's duty to bargain with the United Lakewood Educators, herein the Union, over a proposal submitted by the Union to the District during bargaining over a successor collective bargaining agreement. The petition was held in abeyance pending the parties' efforts to resolve their dispute. When said efforts proved unsuccessful, the Union filed a Motion to Dismiss on January 17, 1984 wherein it asserted that a declaratory ruling petition was not the appropriate manner to resolve the issue raised by the District. The parties thereafter filed briefs in support of and in opposition to said Motion, the last of which was received on April 2, 1984. Having considered the record and the positions of the parties, the Commission makes and issues the following.

FINDINGS OF FACT

1. That the School District of Kettle Moraine, herein the District, is a municipal employer which operates a public school district and has its principal offices at P.O. Box 39, Wales, Wisconsin 53183.

2. That the United Lakewood Educators, herein the Union, is a labor organization having its principal offices at 4620 West North Avenue, Milwaukee, Wisconsin 53208.

3. That the Union is the exclusive collective bargaining representative of all certified professional staff employed by the District who are contracted for more than 75 continuous school days. The District and the Union have been parties to a series of collective bargaining agreements, the most recent of which had an effective date of August 16, 1980 and an expiration date of August 15, 1983. Said agreement contained a reopener provision for the 1982-1983 school year which included bargaining over certain insurance provisions contained in the parties' 1980-1983 agreement. The parties ultimately reached an agreement on the insurance portion of the reopener which was memorialized by the following agreement executed by the parties on February 25, 1983:

AMENDMENT TO TERMS OF AGREEMENT

2/25/83

1. Non-duplication of Insurance Coverage: Any eligible bargaining unit members may elect coverage under District health and/or dental insurance policies.

Each employee shall provide to the District, upon request, information as to whether or not they are covered by any health and/or dental insurance policy other than the District's, the name of any such carrier and also indicate under which policy/policies they desire coverage. If the employee chooses coverage from some other source, the District will not provide any health and/or dental coverage.

2. The language set forth above shall be included as a part of the 1982-83 bargaining agreement. That language will be implemented September 1, 1983. Employees shall elect District or other coverage at least fifteen (15) days prior to September 1, 1983.

Individuals who feel they are subject to special circumstances warranting an exception to the non-duplication of insurance coverage clause may appeal to the Superintendent who may grant an exception to that clause at his discretion.

The parties agree that the non-duplication of insurance coverage language set forth above will continue in a successor to their 1980-1983 collective bargaining agreement and further agree that the subjects of single or equivalent coverage and special individual situations not heretofore contemplated by the parties may be included as subjects of negotiations in bargaining for a successor to their 1980-1983 agreement. (emphasis added)

3. Article XVII, Section E. (4) of the 1980-1983 agreement shall not be carried forward as a part of the 1982-1983 agreement.

4. The Board will pay the full cost of the health and dental insurance premiums provided by the contract and will eliminate reference to dollar amounts in those clauses.

4. That the parties' efforts to reach agreement on a successor to their 1980-1983 contract led to the filing of a mediation/arbitration petition pursuant to Sec. 111.70(4)(cm), Stats. During the investigation of said petition by a member of the Commission's staff, the parties exchanged tentative final offers. The Union's final offer as modified by the January 17, 1984 Motion, contains the following provisions:

This section replaces all of Article 17, Section E. Insurance, contained in the 1982-83 collective bargaining agreement.

ARTICLE 17- COMPENSATION

. . .

E. Insurance

1. Health Insurance

The hospital/surgical insurance coverage to be provided to all bargaining unit employes by the District shall be not less than the coverages and benefit specifications contained in the WEAIT Insurance Plan in effect (between the WEAIT and the District) on January 1, 1983. The specific coverages and benefit levels of said Plan shall be incorporated into this Agreement by reference and shall have the same effect as if made a part hereof. The District shall pay the full cost of the health insurance premiums necessary to provide the benefit levels and coverages of said Plan.

2. Dental Insurance

The dental insurance coverage to be provided to all bargaining unit employes by the District shall be not less than the coverages and benefit specifications contained in the

WEAIT Insurance Plan in effect (between the WEAIT and the District) on January 1, 1983. The specific coverages and benefit levels of said Plan shall be incorporated into this Agreement by reference and shall have the same effect as if made a part hereof. The District shall pay the full cost of the dental insurance premiums necessary to provide the benefit levels and coverages of said Plan.

3. Conditions on Health and Dental Insurance Coverage

(a). Any two employes of the District who are married to each other will be provided one (1) family protection coverage, or if no dependents are to be covered, they may be covered by two (2) single coverages if the cost is less than one family coverage. Any married persons who are protected by single coverage will be covered by a family policy protection upon notice to the District prior to assuming responsibility for dependents.

(b) Teachers who were removed from District insurance coverage by operation of the Board's "Non-duplication of Insurance Coverage" clause, shall have the insurance eligibility and coverages reinstated as of October 1, 1983.

4. Optional Benefit In Lieu of Family Insurance Coverage

(a) District employes who elect to discontinue family insurance coverage protection under the District's health and/or dental insurance plan(s) may elect an optional benefit in the amount of a contribution that shall be equal to the cost of a single health and/or dental insurance annual premium(s).

(b) Employes who elect optional benefits in lieu of family insurance coverages shall be provided with a continuous open enrollment opportunity and may re-enter the District's health insurance and/or dental insurance programs at any time, for any reaons, or no reason, without providing evidence of insurability. Re-entry shall be accomplished at the same time the employe provides written notice to the District in the form of a completed insurance application form (provided by the District or the insurance carrier) identical to the insurance enrollment forms used to enroll or re-enroll all other emloyes. (sic)

(c) Benefit options which employes may elect in lieu of family health and/or dental insurance coverage shall include the following:

1. The employe may elect to have the contribution(s) made to a Tax Sheltered Annuity account of the emloye's (sic) choice.

2. The employe may elect to continue to be insured by a single health and/or dental insurance plan protection coverage.

3. The employe may elect to continue a drug prescription coverage provided by the District and have the District pay the deductible amounts required by a spouse's family group health and/or dental insurance plan.

5. Life Insurance: A Group Life Insurance Plan based on the nearest $1,000.00 of contracted salary, will be supported by the District by paying an amont of 100% of the premium.

6. LTD: The Board agrees to pay up to .0037 x salary for LTD insurance through the contract year 1983-84.

The District made a timely objection to said final offer asserting that, contrary to the parties' February 1983 agreement, the non-duplication of benefits language was not contained therein. Said objection was followed by the filing of the instant petition for declaratory ruling wherein the District has asserted that the Union waived its right to bargain over the non-duplication of benefits language when it expressly agreed that such language would be included in a successor collective bargaining agreement and therefore that the Union could not include a proposal which would delete said language in its final offer for a successor contract.

5. That the parties' disagreement regarding the status of the non-duplication of benefits language constitutes a dispute concerning the duty to bargain.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

1. That inasmuch as there currently exists a dispute concerning the duty to bargain between the Union and the District over a non-duplication of benefits proposal contained in the Union's tentative final offer, a declaratory ruling proceeding brought pursuant to Sec. 111.70(4)(b), Stats. is an available and appropriate mechanism for resolving said dispute.

Based on the above and foregoing Findings of Fact and Conclusion of Law the Commission makes and issues the following

ORDER

That inasmuch as a declaratory ruling proceeding pursuant to Sec. 111.70(4)(b), Stats. is an available and appropriate means to resolve the parties' dispute concerning the duty to bargain, the Union's Motion to Dismiss is hereby denied.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DENYING MOTION TO DISMISS

The Union premises its Motion to Dismiss upon its assertion that the allegations contained in the District's petition do not form the basis for a Sec. 111.70(4)(b) declaratory ruling proceeding but instead for a prohibited practice complaint pursuant to Sec. 111.70(3)(b)3. and/or 4., Stats. The Union notes that the District does not allege that the Union proposals for Article 17, Sec. E, Insurance, are themselves permissive subjects of bargaining. Thus, the Union argues that the dispute which exists between the parties to this proceeding concerns not the bargainability of the Union's insurance benefit proposals but rather the meaning of the parties' agreement of February 25, 1983. The Union contends that the bases for the District's petition are its allegations that the Union's proposal either should include an additional clause which is currently not present in the proposal, or improperly includes a non-duplication provision which is not the same as the one which the District contends should be included because of the February 1983 agreement. The Union asserts that either allegation requires a ruling not on the bargainability of the Union's proposal but rather on the meaning and intent of a prior agreement between the parties. The Union asserts that such a ruling does not fall within the purpose or function of Sec. 111.70(4)(b) declaratory ruling proceedings.

The Union asserts that the situation presented herein is analogous to that which confronted the Commission in City of Wisconsin Rapids, 14543-A (11/76), wherein the Commission held that "the purpose of the declaratory ruling procedure in Sec. 111.70(4)(b) is to have the Commission decide what is bargainable. Here, however, the instant dispute does not concern what is bargainable, but rather what is meant by the bargain that was reached." It also cites City of Milwaukee, 15131 (12/76), where the Commission noted that a petition seeking a determination as to the meaning of an agreement, and not its bargainability, does not fall within the intent of Sec. 111.70(4)(b), Stats.

The Union asserts that the issues raised by the District's petition concern the legality of the Union's bargaining conduct with respect to the non-duplication of insurance coverage clause, the meaning of the agreements allegedly reached by the District and the Union on February 25, 1983, and whether the Union has breached those agreements and thereby violated Sec. 111.70(3)(b)3. and/or 4., Stats. Thus, the Union contends that in this proceeding the District is not seeking to have the Commission decide what is bargainable; instead, the District seeks a Commission decision concerning what was meant by the bargained agreement reached on February 25, 1983 and whether the Union has breached same. The Union also notes that to allow the District to litigate this matter in a declaratory ruling yields a concomitant suspension of the parties' pending mediation-arbitration proceedings which interferes with the Union's right to engage in meaningful collective bargaining and to utilize a "fair, speedy, effective" procedure for settling impasses in that bargaining.

The Union argues that if the District prevails in a prohibited practice proceeding against the Union, the refusal to bargain and/or breach of contract violations will be remedied by reformation of the parties' collective bargaining agreement to include the "non-duplication of insurance coverage" clause, as interpreted by the District, which the District alleges the Union agreed to include in a successor agreement. Thus, the Union argues that the District will suffer no prejudice from being required to litigate its allegations in the prohibited practice forum and no reason exists to permit the delay in the parties' mediation-arbitration proceedings which would result from allowing the District to litigate its allegations as a petition for declaratory ruling. In this regard, the Union notes that it would agree to waive the requirements of Sec. 111.07(5) and 227.09(2), Stats., to allow the parties to receive a prohibited practice decision directly from the Commission without the need for an intervening examiner decision.

In response to the cases cited by the District, the Union asserts that in Cambria-Friesland School District, 16336 (4/78) and Eau Claire County, 16354-A (5/78), no party to said declaratory ruling proceedings objected to the use of such a procedure for resolving the parties' dispute as to the scope of a contractual reopener provision. The Union also contends that in the present case,

the issues are whether the Union's insurance proposal is consistent with the parties' February 1983 agreement and whether the Union has violated that agreement or its duty to bargain. Thus, the Union argues that the two cases cited above, which involved the scope of a contractual reopener, are not sufficiently analogous to the present case to be dispositive of the issues raised herein.

In summary, the Union asserts that the District's petition does not raise a question "as to whether any proposal made in negotiations by either party is a mandatory, permissive or prohibited subject of bargaining," within the meaning of Sec. 111.70(4)(cm)6.g., Stats., or ERB 31.11 and 31.12, nor does it allege a legitimate "dispute . . . concerning the duty to bargain on any subject," within the meaning of Sec. 111.70(4)(b), Stats. Thus, the Union asserts the District has no legal right to obtain a declaratory ruling from the Commission and that the Commission has no statutory authority to issue such a declaratory ruling with respect to the matters alleged in the District's petition. If the District is nevertheless permitted to invoke the lengthy procedures of the Commission for processing declaratory ruling petitions, with its inherent suspension of the bargaining process for months, the Union asserts that the employes represented by it will be effectively denied the right to engage in meaningful collective bargaining and to utilize a "fair, speedy, effective" procedure for settling impasses in that bargaining, as guaranteed in Sec. 111.70(2) and (6), Stats.

The District opposes the Union's Motion to Dismiss asserting that the Commission is required by Sec. 111.70(4)(b), Stats. to accept and resolve disputes arising between a municipal employer and a union of its employes concerning the obligation to bargain on any subject. In the instant case, the District asserts that a dispute has arisen concerning its obligation to bargain over the issue of non-duplication of insurance benefits. The District contends that the dispute has arisen as a result of the Union's proposal to delete the language of Article 17, E. 2. b., the non-duplication of insurance benefits language agreed upon by the parties during reopener negotiations for the last year of the 1980-1983 agreement. The District submits that the Union, by its agreement in February 1983 that the matter of non-duplication of insurance benefits will continue in a successor to the 1980-1983 bargaining agreement, has clearly and unmistakably waived its right to bargain over that issue during the negotiations for a successor to the 1980-1983 collective bargaining agreement. When the Union included in its proposals and in its final offer a proposal to delete the language which it had earlier agreed to include in a successor agreement, the District contends that a dispute over the bargainability of that language arose.

Contrary to the Union, the District argues that the dispute in the instant matter is not whether the parties must negotiate over the subject of non-duplication of insurance benefits generally, but whether the parties must negotiate over the matter during the negotiations for a successor to the 1980-1983 collective bargaining agreement. The District contends that it is the timing of the bargaining obligation which is the issue in this case. The District alleges that the Union's arguments herein reflect an overly restrictive and narrow interpretation of Sec. 111.70(4)(b), Stats. The District contends that declaratory ruling petitions are concerned with the bargainability of issues raised during negotiations and thus may entail a determination of whether the parties have waived the right to bargain on a mandatory subject as well as the scope and timing of such a waiver. The District asserts that Commission case law clearly establishes that an employer and a labor organization can voluntarily agree to limit matters which are subject to negotiation between them and thereby place restrictions on issues which may be taken to mediation-arbitration. The District notes that parties to multi-year agreements frequently do so by negotiating limited reopener provisions. During reopener negotiations pursuant to said provisions, the District notes that neither party has a duty to bargain over items which do not fall within the scope of the reopener, nor would it be permissible for a party to take an issue outside of the scope of the reopener provision to arbitration. If one party seeks to engage in bargaining outside the scope of the reopener provision, a dispute concerning bargainability arises and such disputes have been and should be resolved by the Commission in declaratory ruling proceedings. In this regard, the District cites the Commission's decisions in Cambria-Friesland School District, supra, and Eau Claire County, supra.

The District contends that the instant situation is analogous to the scope of reopener cases referenced above. In this case, the District contends that a dispute has arisen over the bargainability of the matter of the non-duplication of insurance benefits during the contract negotiations for a successor to the parties' 1980-1983 contract. That dispute, in the District's view, is premised

upon the Union proposal to delete certain language and directly impacts upon the District's obligation to bargain. Therefore, the District contends that the petition for declaratory ruling is properly before the Commission.

The District further alleges that whether it has alternative remedial avenues available to it is immaterial to a resolution of the bargainability issue properly before the Commission in this proceeding. It contends that the Union's citation of City of Wisconsin Rapids, supra, does not provide support for the Union's position. At issue in this proceeding is not what the parties meant by their non-duplication language itself but rather what the meaning of the language of the February 25, 1983 agreement was concerning the continuation of the non-duplication language in a successor agreement. The District submits that the February 25, 1983 agreement is akin to a reopener which reflects the parties' intention to narrow the scope of bargaining. Therefore, the District contends that the February 1983 agreement must be considered by the Commission in resolving the instant dispute as it relates to the timing of the bargaining obligation. While the District has reserved its right to file a prohibited practice as a result of the actions of the Union in this matter, the District contends that a prohibited practice does not address and would not resolve the bargainability issue raised by this petition. The District contends that the choice of forum under the Wisconsin statutory scheme is left to the party bringing the action. Whether alternative forms are available to the District is therefore immaterial in the District's view as it relates to the specific issue of the bargainability of the non-duplication of insurance benefit clause for a successor to the parties' 1980-1983 agreement.

The District contends that the issue in this case relates to a determination of whether there was a waiver of the bargaining obligation concerning a mandatory subject of bargaining. The District argues that facts relative to a determination of waiver cannot be examined on a "Motion to Dismiss" but rather require a hearing to allow for full consideration of the positions of both parties. To deprive the District of a hearing by resolution of the matter through the granting of the Union's Motion would be in direct contravention to the cases cited earlier herein. Moreover, the District contends that the Union's argument regarding alternative remedies is misplaced. The District argues that the Union's scenario as to how a contract could be subsequently subject to reformation is contrary to public policy in that it would allow parties to flagrantly violate binding waiver agreements, force issues which are not bargainable to arbitration, and then require the Commission to make changes to contract provisions which were never negotiable in the first place. The District contends that matters of bargainability are to be resolved prior to the certification of final offers and prior to the hearing of those final offers before a mediator/arbitrator. The District asserts that after the fact reformation would not foster orderly and lawful bargaining by the parties. The District also notes that under existing statutory and administrative procedures, the final offers cannot be certified until matters of bargainability raised by the parties are resolved.

In conclusion, the District contends that it is seeking an orderly means of resolving a dispute concerning the bargainability of non-duplication of insurance benefits for a successor to the 1980-1983 contract. The District contends that the Commission must affirm that the petition filed by the District falls within the scope of the declaratory ruling provisions as recognized by prior Commission case law and must therefore deny the Motion to Dismiss filed by the Association in this matter. The District asserts that established statutory policies, directed to the maintenance of labor peace and preservation of the rights of both labor and management would be best served if the declaratory ruling process were followed in this case. The District contends that under such a procedure, matters of bargainability are directly resolved during collective bargaining prior to the institution of final offer arbitration proceedings rather than later having to disturb an agreement reached in one statutory process as a remedy in an entirely different statutory proceeding. Therefore the District respectfully requests that the Motion to Dismiss be denied.

DISCUSSION

Having reviewed the parties' arguments, we conclude that the instant dispute does indeed constitute a "dispute . . . between a municipal employer and a union of its employes concerning the duty to bargain on any subject . . ." which is appropriately resolved by a Sec. 111.70(4)(b) declaratory ruling. 1/ We find the

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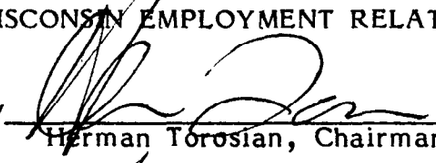
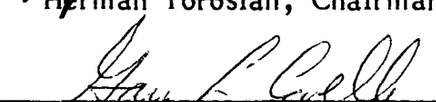
1/ Brown County, 20620 (5/83) and Fox Point-Bayside Schools, 19619 (5/82).

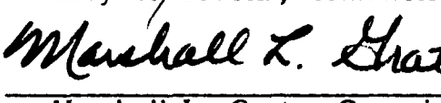
analogy drawn by the District to disputes over the scope of a reopener to be an apt one. The District is asserting that the parties have agreed to limit the scope of bargaining over the issue of non-duplication of insurance benefits. If such an agreement exists, it would limit the issues over which the District has an obligation to bargain when seeking to reach an agreement with the Union over a successor to the 1980-1983 contract. We conclude that disputes as to the scope of the bargaining obligation clearly constitute "disputes" which Sec. 111.70(4)(b), Stats. can be utilized to resolve. Our review of the City of Wisconsin Rapids and City of Milwaukee decisions cited by the Association does not yield a contrary result. Neither of those cases involved scope of bargaining issues. Thus, while it is true that the Commission will be obligated to interpret the parties' February 1983 agreement when determining the scope of the District's current bargaining obligation, we will be doing so only for the purpose of determining whether that agreement limits the scope of that bargaining obligation. We have therefore denied the Association's Motion to Dismiss.

Dated at Madison, Wisconsin this 7th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner