

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
RACINE EDUCATION ASSOCIATION,  
Requesting a Declaratory Ruling  
Pursuant to Section 111.70(4)(b),  
Wis. Stats., filing a dispute  
between said Petitioner and  
RACINE UNIFIED SCHOOL  
DISTRICT  
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Case LXXXIV  
No. 33172 DR(M)-345  
Decision No. 21689

Appearances:

Schwartz, Weber, Tofte and Nielsen, Attorney and Counselors, 704 Park Avenue,  
Racine, Wisconsin 53403, by Mr. Robert K. Weber, on behalf of the  
Association.

Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, Suite 600 Insurance  
Building, 119 Monona Avenue, P. O. Box 1664, Madison,  
Wisconsin 53701-1664 by Mr. Jack D. Walker, on behalf of the  
District.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER DISMISSING PETITION FOR DECLARATORY RULING

On April 10, 1984, the Racine Education Association filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the Association's duty to bargain with the Racine Unified School District over certain portions of the District's final offer submitted to the Commission pursuant to Sec. 111.70(4)(cm) Stats. On April 11, 1984 the District filed a motion to dismiss said petition for declaratory ruling asserting that the Association had waived its right to contend that the challenged portions of the District's final offer were permissive subjects of bargaining. The Association responded to said motion on April 25, 1984. Having considered the record and the parties' positions, the Commission makes and issues the following

FINDINGS OF FACT

1. That the Racine Unified School District, herein the District, is a municipal employer having its offices at 2220 Northwestern Avenue, Racine, Wisconsin 53404.

2. That the Racine Education Association, herein the Association, is a labor organization having its offices at 701 Grand Avenue, Racine, Wisconsin 53403.

3. That at all times material herein, the Association has been the exclusive collective bargaining representative of certain individuals employed by the District as teachers and related professionals; and that the District and the Association have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employment of said employees, the last of which had a term of August 25, 1979 through August 24, 1982.

4. That during collective bargaining between the parties over the terms of an agreement which would succeed their 1979-1982 contract, a dispute arose as to their duty to bargain over certain matters; that to resolve a portion of said dispute the Association filed a petition for declaratory ruling with the Wisconsin Employment Relations Commission on April 11, 1983, pursuant to Sec. 111.70(4)(b), Stats., wherein it asserted that certain portions of the District's final offer, submitted pursuant to Sec. 111.70(4)(cm) Stats., were not mandatory subjects of bargaining; that on January 5, 1984, the Commission issued Findings of Fact, Conclusions of Law and Declaratory Ruling which determined the status of the District proposals challenged by the Association in its petition for declaratory ruling; that the parties thereafter resumed their efforts to voluntarily reach agreement on a successor collective bargaining agreement; that pursuant to said effort the parties again exchanged final offers pursuant to Sec. 111.70(4)(cm)

Stats.; and that pursuant to ERB 31.11(b), the Association filed an objection to certain portions of the District's final offer and subsequently filed the instant petition for declaratory ruling.

5. That the proposals challenged herein by the Association were present in the District's March 1983 final offer which was the subject of the declaratory ruling proceeding referenced in Finding of Fact 4; that the Association did not challenge said proposals in its April, 1983 petition for declaratory ruling; and that by failing to make said challenge, the Association waived its right under Sec. 111.70(4)(cm)(6)(a) Stats., to assert that the proposals challenged herein are permissive subjects of bargaining.

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

#### CONCLUSION OF LAW

That as the Association has by its conduct waived its right to obtain a declaratory ruling from the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b) Stats. and 111.70(4)(cm)(6)(a) Stats., the proposals challenged in the instant petition for declaratory ruling are considered to be mandatory subjects of bargaining.

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

#### ORDER 1/

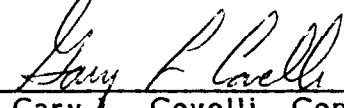
That the Association's petition for declaratory ruling be, and the same hereby is, dismissed.

Given under our hands and seal at the City of  
Madison, Wisconsin this 16th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Gary L. Covelli, Commissioner

  
Marshall L. Gratz, Commissioner

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- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Footnote 1 continued on Page 3)

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.

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

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSION OF LAW AND ORDER  
DISMISSING PETITION FOR DECLARATORY RULING

In its Motion to Dismiss, the District asserts that the two provisions of its final offer which have been challenged herein by the Association were included in the District's March 31, 1983 final offer and that the Association's failure to challenge said proposals at that time constitutes a waiver of the Association's right to object that said proposals are not mandatory subjects of bargaining. The District cites the Commission's decision in Madison Metropolitan School District, 16598-A (1/79) as support for its position and requests that the Commission proceed to dismiss the instant petition.

The Association admits that it did not previously challenge the proposals at issue herein but contends that it has complied in all respects with ERB 31.11 and that the petition is thus properly before the Commission for resolution. The Association contends that the Commission's decision in Madison Metropolitan School District, *supra*, is not applicable herein and asserts that said decision should be restricted to those situations where the parties have already engaged in the declaratory ruling process on the disputed proposals.

In Madison Metropolitan School District, *supra*, the Commission concluded that where a party had obtained a declaratory ruling from the Commission pursuant to Sec. 111.70(4)(b) Stats. resolving a dispute as to whether a portion of a final offer submitted pursuant to Sec. 111.70(4)(cm) Stats. was mandatory or permissive, the objecting party could not thereafter again object to the disputed proposal through the submission of arguments which were not raised in the initial proceeding. The Commission reasoned:

We agree that the District should be deemed to have waived any objection to MTI's replacement employee proposal other than the objection identified at the hearing and argued in its post-hearing brief. The Commission's rules 3/ allow either party to raise the question of the mandatory nature of any of the other party's proposals at any time during negotiations and before the investigation is closed. Nevertheless, they are encouraged to attempt to "bargain around the problem" by Section ERB 31.11(2) Wis. Adm. Code 4/ which expressly provides that bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation, shall not constitute a waiver of the right to file objections under Section ERB 31.11(1)(b) Wis. Adm. Code. 5/

Section ERB 31.11(1)(b) Wis. Adm. Code. 6/ provides that either party can wait until the "eleventh hour", before the investigation is closed and their final offers become final, to file their objections. The purpose of this rule is to provide the parties with every reasonable opportunity to narrow, if not settle, all of the issues in dispute without unduly prolonging the process. However this rule is also intended to implement the legislative intent that "(p)ermissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject ". 7/

The District's subsequent objections are not unique to the proposal, as amended, and could easily have been identified at the hearing and argued in its post-hearing brief. By failing to raise the arguments in question until after the Commission had already rendered its decision and MTI had amended its proposal to specifically overcome its one substantive objection which was argued and was found to be meritorious, we deem that the District has waived its right to raise other objections to the proposal. Even if it could be said that the District has not waived its right to raise

additional objections, we believe it should be estopped from doing so. To conclude otherwise would be to encourage piecemeal litigation and allow one or the other party to engage in dilatory tactics contrary to the policy of the statute and the intent of our rules, namely to encourage voluntary settlements but that if voluntary procedures fail, to ensure that the parties have available to them a fair, speedy and above all peaceful procedure for settlement. 8/

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3/ "ERB 31.11 Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining. (1) Time for raising objection. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing.

(a) During negotiations, mediation or investigation. Should either party, during negotiations or during commission mediation or investigation raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, either party may commence a declaratory ruling before the commission pursuant to s. 111.70(4)(b), Stats., and chapter ERB 18, Wis. Adm. Code seeking a determination as to whether the proposal or proposals involved relate to a non-mandatory subject or subjects of bargaining.

(b) At the time of call for final offers. Should either party, at such time as the commission or its agent calls for and obtains and exchanges the proposal final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, such offers shall not be deemed to be final offers and the commission or its agent shall not close the investigation or hearing but shall direct the objecting party to reduce the objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for such claim. Such objection shall be signed and dated by a duly authorized representative of the objecting party, and copies thereof shall, on the same date, be served on the party, as well as the commission or its agent conducting the investigation or hearing, in the manner and within such reasonable time as determined by the commission or its investigator.

(2) Effect of Bargaining on Permissive Subjects. Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection as set forth in par. (1)(b) above."

4/ Supra note 3.

5/ Supra note 3.

6/ Supra note 3.

7/ Section 111.70(4)(cm)(6)(a) Stats.

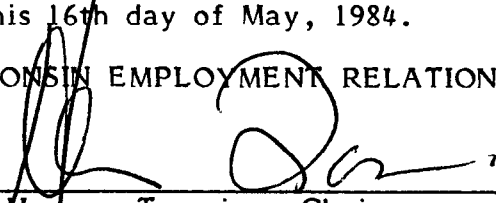
8/ See Section 111.70(6) MERA and Section ERB 31.02 Wis. Adm. Code.

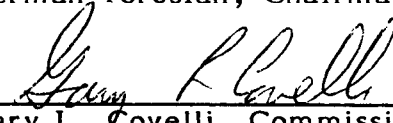
We conclude that the policies upon which the Commission's decision rested in Madison Metropolitan School District, also warrant a conclusion herein that the Association has waived its right to object to those portions of the District's final offer which could have been but were not challenged in the prior declaratory ruling proceeding. As our prior decision adequately sets forth our applicable rationale, we need not repeat same herein. Suffice it to say that our obligation to ensure that the parties have available to them a fair, speedy and above all peaceful procedure for settlement of disputes requires that the piecemeal litigation of matters contained in parties' final offers be prohibited. We have therefore granted the District's Motion To Dismiss.

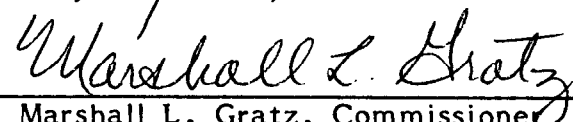
Dated at Madison, Wisconsin this 16th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Gary L. Covelli, Commissioner

  
Marshall L. Gratz, Commissioner