

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
SCHOOL DISTRICT NO. 5, FRANKLIN :
To Initiate Mediation-Arbitration :
Between Said Petitioner and :
FRANKLIN EDUCATION ASSOCIATION :

Case 35
No. 31822 MED/ARB-2323
Decision No. 22211

Appearances:

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Franklin Education Association.
Mr. Mark L. Olson, Mulcahy & Wherry, S.C., Attorneys at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, appearing on behalf of the District.

ORDER GRANTING MOTION TO REOPEN
MEDIATION-ARBITRATION INVESTIGATION

The above-named Association having, on June 24, 1983, filed a petition with the Wisconsin Employment Relations Commission wherein it alleged that an impasse existed between it and the above-named District in their collective bargaining, and wherein it further requested the Commission to initiate Mediation-Arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act; and Stephen Schoenfeld, a member of the Commission's staff, having conducted an investigation in the matter on August 29 and September 12, 1983, and September 10, 1984; and said investigation having been held in abeyance for a period of time between the latter two investigation sessions due to the pendency of a declaratory ruling proceeding concerning the scope of mandatory bargaining; and, on October 19, 1984, said Investigator having submitted to the Commission his report of the results thereof, stating that the Investigator advised the parties that the investigation was closed; and prior to any further action by the Commission, the Association, on November 9, 1984, having filed a Motion to Reopen Mediation-Arbitration Investigation in the matter; and the above-named District having submitted a Statement in Opposition to said motion on November 29, 1984; and the Commission having considered the Motion and Statement in Opposition thereto and the contents of the Mediation-Arbitration case file including correspondence between the parties and the Investigator; and the Commission being satisfied that the motion can be appropriately ruled upon without need of hearing or further argument; and the Commission being fully advised in the premises, and being satisfied that it should grant the Association's motion to reopen the investigation;

NOW, THEREFORE, it is hereby

ORDERED

1. That the Investigator's Notice of Close of Investigation dated October 19, 1984, shall be and hereby is set aside such that the investigation in the above matter shall be, and hereby is reopened.

Given under our hands and seal at the City of
Madison, Wisconsin this 17th day of December, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Herman Torosian, Chairman

Marshall L. Gratz, Commissioner

Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER
GRANTING MOTION TO REOPEN
MEDIATION-ARBITRATION INVESTIGATION

In its Motion, the Association requests the Commission to reopen the mediation-arbitration investigation that was closed by the Investigator on October 19, 1984. The Association's request is based, essentially, on the ground that the Association had advised the Investigator of its desire to modify its final offer at a time prior to the Investigator's issuance of the Notice of Close of Investigation. The Association argues that, in view of the express terms of Commission Rule ERB 31.09(2), 1/ it was improper for the Investigator to have closed the investigation as he did.

The District opposes the motion, essentially on the ground that the Association, District and Investigator had agreed to ground rules for the investigation under which the final offers were to become unamendable once submitted by mail to the Investigator. Thus, the District asserts, the Association's request to make substantial changes in its final offer is untimely under the agreed-upon procedure, and the Investigator properly closed the investigation on that basis after considering arguments on the question from both parties.

The parties' written submissions to the Investigator and to the Commission contain lengthy assertions of fact and arguments of law. However, in our view, the case is controlled by a very few undisputed facts, and by an established interpretation of the Commission's Rules.

It is undisputed that the Association had advised the Investigator of its desire to modify its final offer prior to the time the Investigator issued (i.e., placed in the mail) the October 19, 1984, Notice of Close of Investigation. It is also clear that the parties have not entered into (and have not filed with the Commission) a written Sec. 111.70(4)(cm)5 voluntary impasse resolution procedure which by its terms made ERB 31.09(2) inapplicable to the instant dispute. 2/

1/ ERB 31.09(2), Wis. Adm. Code, reads as follows:

INFORMAL INVESTIGATION PROCEDURE. The commission or its agent shall set a date, time and place for the conduct of informal investigation and shall notify the parties thereof in writing. The informal investigation may be adjourned or continued as the commission or its agent deems necessary. During said investigation the commission or its agent may meet jointly or separately with the parties for the purposes described in subsection (1) above. Prior to the close of the investigation the investigator shall obtain in writing the final offers of the parties on the issues in dispute, as well as a stipulation in writing on all matters agreed upon to be included in the new or amended collective bargaining agreement. At the same time the parties shall exchange copies of their final offers, and shall retain copies of such stipulation, and if at said time, or during any additional time permitted by the investigator, no objection is raised that either final offer contains a proposal or proposals relating to nonmandatory subjects of bargaining, the commission agent shall serve a notice in writing upon the parties indicating the investigation is closed. The commission or its agent shall not close the investigation until the commission or its agent is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer. Following the close of the investigation the commission agent shall report the findings to the commission, either orally or in writing, as the commission may direct, and at the same time transmit to the commission the final offers and the stipulation received from the parties. (Emphasis added)

2/ Section 111.70(4)(cm)5, Stats., reads as follows:

Voluntary impasse resolution procedures. In addition to the other impasse resolution procedures provided in this paragraph, a municipal employer and labor organization may at any time, as a permissive subject of bargaining, agree in writing to a dispute settlement procedure, including authorization (Continued on Page 3)

In Milwaukee Area Technical College, Dec. No. 17402 (WERC, 11/79), the Commission addressed the relationship between the requirements of ERB 31.09(2) on the one hand, and the need to provide flexibility and predictability to the Commission Investigators and the parties in the conduct of mediation-arbitration investigations on the other. While the fact situation in that case differed in several respects from the instant facts, the basic principles developed there are equally applicable here. Specifically, the Commission held that while the Investigator has considerable latitude "in establishing ground rules for the implementation of Section ERB 31.09(2) Wis. Adm. Code in given fact situations", "the notice closing investigation" is of "controlling importance . . . in relation to any such ground rule." Id. at 8. The Commission there concluded that the employer had a right to amend its final offer despite union objections based on ground rules because the investigator in that case had not issued a notice of close of investigation prior to the employer's advising the Investigator of its desire to amend. The same principles are applicable here.

The parties and Investigator were free to agree upon arrangements for submission of contemplated final offers and opportunities to change. However, the ground rules established by the parties or the Investigator could not defeat the ERB 31.09(2) right of either party to amend its offer without the other's consent at any time prior to issuance (placement in the mail or hand delivery) of the notice of close of investigation.

Had the parties formally executed and filed with the Commission a Sec. 111.70(4)(cm)5 voluntary dispute resolution procedure fashioned in such a way as to make compliance with ERB 31.09(2) unnecessary, then that procedure would render that Rule inapplicable. Since there was and is no such formal written procedure agreed upon between the parties and on file with the Commission, there is no basis for our not applying to this case the requirements of ERB 31.09(2) as interpreted in Milwaukee Area Technical College, supra.

Accordingly, neither the parties' arguments concerning the nature of and compliance with ground rules arrangements made with the Investigator nor the Investigator's decision that the Association's attempt to amend its offer was violative of the agreed-upon arrangements is material or controlling herein.

The Investigator issued his notice closing the investigation herein after the Association notified him that it wished to further amend its final offer. Notwithstanding the circumstances that led to the Investigator's issuance of the notice, the investigation could not properly be closed under the Commission's Rules.

Accordingly we have granted the Association's motion and have ordered the investigation reopened. The Investigator is instructed not to close the investigation until neither party, having knowledge of the content of the final offer of the other party, would amend any proposal in its final offer.

Dated at Madison, Wisconsin this 17th day of December, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian, Chairman
Marshall L. Gratz, Commissioner
Danae Davis Gordon, Commissioner

2/ (Continued)

for a strike by municipal employees or binding interest arbitration, which is acceptable to the parties for resolving an impasse over terms of any collective bargaining agreement under this subchapter. A copy of such agreement shall be filed by the parties with the commission. If the parties agree to any form of binding interest arbitration, the arbitrator shall give weight to the factors enumerated under subd. 7.