STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WAUPUN EDUCATION ASSOCIATION Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving A Dispute Between Said Petitioner and WAUPUN SCHOOL DISTRICT	Case 20 No. 32273 DR(M)-327 Decision No. 22409

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 Association.

Mulcahy and Wherry, S.C., Attorneys at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, by Mr. Mark L. Olson, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On October 6, 1983, the Waupun 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 whether it had a duty to bargain with the Waupun School District over certain proposals made by the District during collective bargaining. The parties waived hearing in the matter and submitted a factual stipulation which is incorporated into the instant Findings of Fact. The parties thereafter filed written argument with the period for filing same having expired on August 23, 1984. Having reviewed the record and the parties' arguments, the Commission makes and issues the following

FINDINGS OF FACT

1. That the Wisconsin Education Association, herein the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.; and that the Association's principal representatives for purposes of this proceeding are: Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708 and Mr. Gary L. Miller, Executive Director, Winnebagoland UniServ Unit-South, 785 South Main Street, Fond du Lac, Wisconsin 54935.

2. That the School District of Waupun, herein the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., located at 950 Wilcox Street, Waupun, Wisconsin 53963; and that the District's principal representative is Attorney Mark L. Olson, Mulcahy and Wherry, S.C., 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202.

3. That at all times material herein, the Association is and has been the exclusive collective bargaining representative of employes of the District in the bargaining unit composed of all full-time and regular part-time employes of the District engaged in teaching, including classroom teachers, Title I teachers, librarians, and guidance counselors; and that at all times material herein, the Association and the District have been parties to a series of collective bargaining agreements governing the wages, hours and other conditions of employment of the employes in said bargaining unit, the most recent of which expired by its terms on June 30, 1983.

4. That the above-mentioned 1981-83 collective bargaining agreement provided inter alia, the following:

ARTICLE VIII, GRIEVANCE PROCEDURE

. . .

2. Definitions:

. . .

b. Grievant: A grievant may be a teacher, a group of teachers, or the Association, subject to the limitations of Section 4(c) and (d) of this Article.

. . .

4. Miscellaneous Provisions:

. . .

c. Multiple Grievances: In those cases involving grievances by teachers with identical claims, to avoid the filing of multiple grievances, one grievance may be filed which contains the signatures of all grieving teachers, commencing at Step 2.

d. Association Grievance: The Association may process a grievance affecting all teachers. A matter of contract interpretation affecting the rights of one individual shall not be deemed an Association grievance. The District Administrator shall accept the above grievance as an Association grievance in which case the grievance shall be processed according to Section 3, Step 3 of this Article.

. . .

5. That the Association Grievance language set forth above in Section 4.d., is the result of a proposal made by the Association during the negotiations which resulted in the 1979-81 collective bargaining agreement; that during said negotiations, it was the position of the Association that the following portion of the 1977-79 collective bargaining agreement regarding Association grievances was inadequate inasmuch as Association representatives were experiencing difficulty in obtaining the requisite signature of at least one teacher from each building:

> d. Association Grievance: The Association may process a grievance affecting all teachers as follows:
>
> 1) At least one (1) teacher from each building shall prepare substantially identical grievances in accordance with this Article and present it to the District Administrator.
>
> 2) The District Administrator shall accept the above individual grievance as an association grievance in which case the grievances shall be processed according to Section 3, Step 3 of this Article.

that despite expressing concerns over the manner in which such an expanded right to file Association grievances would be utilized by the Association, the representatives of the District agreed to modify the then-existing language of Section 4.d., Association Grievance; and that this negotiated change resulted in the current language of Section 4.d., Association Grievance, which has been a part of the parties' contracts since that time.

6. That the grievance procedure provisions of Article VIII, set forth above in Finding of Fact 4, as they relate to the Association's independent right to file and process grievances, were interpreted and applied by Arbitrator George R. Fleischli in an Arbitration Award, dated June 24, 1983, wherein Arbitrator Fleischli concluded that the contractual language set forth in Finding of Fact 4 did preclude the Association from independently filing and processing grievances in certain circumstances.

7. That at a bargaining session with the Association on May 9, 1983, the District proposed to delete the provisions of Article VIII, Section 4.d., Association Grievance, from the parties' successor collective bargaining agreement; that in explaining this proposal, the District, through its chief negotiator, Mark L. Olson, stated that this District proposal was intended to preclude the Association from independently filing and processing grievances, whether on its own behalf or on behalf of any members of the bargaining unit; that Olson further indicated that since the current language regarding Association grievances had been included in the collective bargaining agreement, it was the feeling of the Administration and Board that too many grievances had been inappropriately filed as Association grievances, rather than as individual grievances under the above-cited language; that it was further stated that such had been the fear of the District representatives at the time the current language regarding Association grievances had been negotiated by the parties, and that the District representatives therefore felt the Association grievance language should be deleted from the agreement.

8. That in a letter to WERC General Counsel Peter G. Davis, dated July 13, 1983, the District, by its counsel and chief negotiator, Mark L. Olson, stated its interpretation of the provisions of Article VIII, Grievance Procedure of the parties' 1981-83 collective bargaining agreement, set forth above in Finding of Fact 4, to be as follows:

> Please be advised that the current collective bargaining agreement does, in fact, provide for the filing of Association grievances, under certain limitations enumerated in the agreement. The District is unaware of any authority to the effect that the Association has an independent right to file grievances under the negotiated grievance procedure. The District will, therefore, continue to assume its posture to the effect that the Association must attain a negotiated enlargement of its right to file grievances, if such an enlargement of this right is to occur. In the absence of Board assent, such a right cannot be deemed to exist.

9. That throughout the parties' current negotiations, the Association has consistently refused to agree to any District proposals which would limit the Association's independent right to enforce its contract and file grievances, and has proposed the following provision for inclusion in the parties' successor agreement:

> The Association shall have the right to file and process grievances on its own behalf or on behalf of any member(s) of the bargaining unit and the exercise of such right shall not be dependent upon obtaining the approval or signature of bargaining unit member(s) affected by such grievances.

10. That at a bargaining session on August 22, 1983, the District's chief negotiator stated: that under the parties' 1981-83 Agreement, the Association did not have an independent right to file and process grievances; that by proposing to delete the provisions of Article VIII, Section 4.d. from the parties' successor agreement, it was the District's intention that only grievances filed and signed by one or more individual employes could be brought under the parties' successor collective bargaining agreement, and that the Association would have no independent right to file or process grievances; that at the end of this bargaining session, the District proposed to retain in the parties' successor agreement the provisions of Section 2, 4.c. and 4.d. of Article VIII, if the Association would agree to drop its proposal to expressly recognize the Association's right to file and process grievances on its own behalf or on behalf of any members of the bargaining unit without obtaining the approval or signature of bargaining unit members affected by such grievances; and that the Association declined to agree to this proposal.

11. That the District's current contract proposal to the Association, with respect to the grievance procedure provisions relevant to this proceeding, is to retain in the parties' successor collective bargaining agreement those provisions of Sections 2, 4.c. and 4.d. of Article VIII set forth above in Finding of Fact 4; and that the Association has filed the instant declaratory ruling petition contending that the District's proposal as to Article VIII, Section 4.d. is a permissive subject of bargaining.

12. That the District's Article VIII, Section 4.d. proposal set forth in Finding of Fact 4 precludes Association use of the contractual grievance procedure absent an employe grievant and thus effectively renders the contract unenforceable by a party thereto and thereby undermines the Association's statutory right to bargain as the exclusive representative of employes.

13. That the District's Article VIII, Section 4.d. proposal set forth in Finding of Fact 4 does not primarily relate to wages, hours and conditions of employment.

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

CONCLUSION OF LAW

That the District's Article VIII, Section 4.d. proposal set forth in the Finding of Fact 4 is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats.

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

DECLARATORY RULING 1/

That the Waupun Education Association has no duty to bargain with the Waupun School District within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., as to the Article VIII, Section 4.d. proposal set forth in Finding of Fact 4.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Dandé Davis Gordon, Commissioner

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 5)

1/ (Continued)

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

WAUPUN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

The issue before us is one of determining whether a proposal which seeks to condition the majority representative's access to the contractual grievance procedure on the willingness of an affected employe to grieve is a mandatory subject of bargaining. The parties to this dispute have filed extensive briefs which are summarized below.

POSITIONS OF THE PARTIES

The Association

Wisconsin labor policy vests the Association with the exclusive statutory authority and legal responsibility to fairly represent the interests of its bargaining unit members and to negotiate a collective bargaining agreement on their behalf. The collective bargaining agreement between the District and the Association contains a grievance-arbitration procedure which is the parties' joint mechanism for resolving ambiguities in and enforcing the provisions of their agreement. The grievance procedure is also the principal forum for giving effect to the continuing bargaining relationship between the District and the Association during the term of the agreement. As a result of its status and responsibilities as exclusive collective bargaining representative and as co-party to the agreement, the Association has a fundamental interest in, and entitlement to, independent access to the contractual grievance procedure.

The grievance procedure is more than just a means for redress of individual injury: it is recognized as an extension of the collective bargaining process. Accordingly, the Association, as majority representative, has a basic right and interest in the proper and consistent enforcement of all of the terms of the contract which it has negotiated. Moreover, the Association has a fundamental right to participate in grievance processing as the employes' representative, in order to insist upon the equable application of contract language to new or discrete situations and to resolve contractual ambiguities which give rise to grievances in a uniform manner consistent with the interests of the collective.

The Association also has the obligation to protect its members' rights and benefits from being eroded by the failure of individuals to grieve violations of the collective bargaining agreement, and the statutory right to insulate its members from the potential interference or intimidation inherent in direct confrontations with the District by bringing the strength of the collectivity to bear on the grievance process. Thus, the Association has both the right and the duty to prevent the abrogation or dilution of collectively bargained contract provisions by grieving the loss of "individual" benefits, even in cases where the affected individual does not choose to grieve. Moreover, the Association's members have the right to act through their chosen representative when resolving contractual disputes and to take advantage of the Association's particular expertise in resolving grievances in a manner which best represents the employes' collective interests. Finally, the Association has the right to protect and enforce its own contractual rights and to maintain its own authority and credibility by being a party to any grievance resolution. The effective protection and advancement of these core interests and functions of the Association requires independent Association access to the grievance procedure.

The determination of whether the District's grievance proposal is a mandatory or permissive subject of bargaining requires the application of a balancing test with respect to the proposal's degree of interference with the Association's core interests and functions. An employer proposal must be removed from the scope of mandatory bargaining if it would unduly interfere with or infringe upon the union's ability to effectuate its bargaining agent obligations, while furthering no legitimate counterbalancing interests of the employer. If, under Wisconsin law, a union proposal which interferes too much with managerial rights becomes, thereby, a permissive subject of bargaining, a reasonable and balanced application of this same test must result in a ruling that an employer proposal which interferes too much with core union rights and duties is equally a permissive subject of bargaining.

Independent Association access to the grievance procedure for the purposes of enforcing the collective bargaining agreement and representing its own contractual interests and those of its members implicates fundamental Association rights and functions. These previously identified core Association interests and functions are the legal and functional equivalent of the "managerial rights" which the law governing the scope of bargaining has excluded from mandatory negotiations. The District's grievance proposal would deny the Association its independent right to file and process grievances and would effectively eliminate the Association's statutory role as exclusive bargaining representative in protecting bargaining unit employes' terms and conditions of employment and representing them in the grievance procedure. On the other hand, the District has identified no relevant or legitimate countervailing employer interests which are advanced by its proposal. Moreover, the District's proposal is not a proposal for "a grievance procedure," but rather a demand that the Association waive its rights to enforce the contract and to represent its unit members through the grievance procedure. Accordingly, since the District's grievance proposal constitutes an unwarranted restriction on the Association's effective implementation of its representational duties and responsibilities, and unduly interferes with the meaningful exercise of statutory and contractual rights by bargaining unit employes, that proposal is a non-mandatory subject of bargaining. This conclusion is well supported by relevant rulings of the Commmission, the National Labor Relations Board and the federal courts.

The public policy considerations underlying the legislature's enactment of the MERA also support the Association's contention that the District's grievance proposal, which would require a waiver of the Association's statutory rights to represent its membership in grievance processing and to enforce the terms of its bargained agreement with the District, is a non-mandatory subject of bargaining.

The legislature has determined that public sector labor peace and stability are to be promoted by fostering collective bargaining and the voluntary resolution of contractual disputes through the procedures of grievance arbitration. The enforcement of a negotiated agreement through a contractual grievance-arbitration procedure is considered an extension of the collective bargaining process; is separately protected by Sec. 111.70(3)(a)5, Stats.; and is the preferred mechanism for the resolution of disputes arising under the collective bargaining agreement. The District's grievance proposal contravenes the statutory purpose by inhibiting and interfering with the preferred process by which the legislative goals underlying the MERA are to be achieved, because without the independent right to file grievances, the Association would have to resort to other means to resolve contractual disputes. This result would contradict the strong public policy in favor of the utilization of contractual grievance-arbitration procedures for the resolution of disputes between municipal employers and unions.

The Association's right to independently file and process grievances is necessarily derived from both the unit employes' statutory right to bargain through a chosen representative and the Association's duties and responsibilities as exclusive bargaining representative, mandated by the MERA. The Association's right to grieve is also consonant with the District's statutory obligation to recognize and bargain with the employes' exclusive representative. Thus, the Association's right to independently enforce its collective bargaining agreement with the District is derived from the mandates and protections of the MERA. Moreover, in addition to its statutory role in grievance resolution, as an extension of the collective bargaining process, the Association clearly has an independent statutory right to file complaints alleging contract violations under Sec. 111.70(3)(a)5, Stats.

It is well established that a contract proposal which would effect the waiver of a statutorily-derived and protected right is a non-mandatory subject of bargaining, particularly where, as here, the application of the waiver proposal would be repugnant to the basic policies of the MERA. In essence, the rights which the District seeks to require the Association to relinquish pursuant to the District's grievance proposal are the Association's statutory rights to represent bargaining unit employes and to enforce the statutory prohibition, embodied in Sec. 111.70(3)(a)5, Stats., against breaching the terms of a collective bargaining agreement. Since the District's proposal would necessarily implicate the waiver of statutorily-derived and protected rights, and its application would be repugnant to the basic policies of the MERA, the proposal is a non-mandatory subject of bargaining.

Finally, the District's proposal contradicts the public policy underlying the MERA, since it constitutes an interference with separate statutorily-protected rights of individual employes and represents an impermissible repudiation of the District's statutory obligation to recognize and bargain with the Association. The Association must have an independent right to grieve in order to effectively further the policy of giving employes the statutory right to bargain and to enforce their bargained agreements without employer interference or intimidations. It would frustrate the "smooth functioning of labor relations" for the employes' chosen representative not to be in the position to enforce the contract through the grievance-arbitration procedure. Excluding the Association from the grievance procedure is inconsistent with the District's recognition of the Association as the employes' bargaining representative. Since the District's demand that the Association forfeit its ability to represent employe contract interests during the term of the agreement unduly interferes with the meaningful exercise of the statutory rights granted to municipal employes by Sec. 111.70(2), Stats., the District's grievance proposal is a non-mandatory subject of bargaining.

District's Position

The District contends that the appropriate test for determining whether a proposal is a mandatory or permissive subject of bargaining is the determination as to whether the proposal is "primarily related" to wages, hours and conditions of employment or to the formulation or management of public policy. The designation of a grievance as an individual grievance or as in "Association grievance" has no primary relationship to the establishment of public policy in the District. The District therefore asserts that the provision is a mandatory subject of bargaining which can only be altered through the collective bargaining process which was the genesis of the language at issue.

The District contends that the interrelationship between the grievance procedure and the duty to bargain has been consistently recognized by courts throughout the United States. Bethlehem Steel Co., 133 NLRB 1347, enf. den. on other grounds, 320 F.2d 615 (CA 3, 1963); cert. denied, 375 U.S. 984 (1964); Hughes Tool Co. v. NLRB, 147 F.2d 69 (CA 5, 1945); Peerless Food Products, Inc., 236 NLRB 161 (1978); Turbodyne Corp., Gas Turbine, 226 NLRB 322 (1976); Crown Coach Co., 155 NLRB 625 (1965); La Trobe Steel Co., 244 NLRB 328 (1979), enf. granted in part and den. in part, 630 F.2d 271, (CA 3, 1980). The District asserts that the National Labor Relations Board has consistently held that provisions of collective bargaining agreements which deal with grievance processing are mandatory subjects of bargaining. Bethlehem Steel Co., supra. The District contends that a similar conclusion was reached by the Michigan Supreme Court in Pontiac Police Officers Association v. Pontiac, 94 LRRM 2175 (1976).

Both the Wisconsin Employment Relations Commission and Wisconsin appellate courts have determined that a grievance procedure is a mandatory subject of bargaining due to its primary relationship to wages, hours and conditions of employment. In Racine Unified School District No. 1, Dec. No. 11315-B,D (WERC, 4/74) the Commission concluded that the District, by unilaterally establishing a new grievance procedure which more narrowly defined those claims which could be grieved, had failed to bargain over a mandatory subject of bargaining. More recently, in Blackhawk VTAE, Dec. No. 16640-A (WERC, 9/80), aff'd (CirCt Rock, 8/81) aff'd in relevant part, 109 Wis.2d 415 (CtApp, 1982) the Commission concluded that a definition of a grievance, contained in a contractual grievance procedure, which was limited to disputes involving the interpretation, application, or enforcement of the contract was a mandatory subject of bargaining. The definition of a grievance in the instant dispute parallels that found to be mandatory by the Commission in Blackhawk, and inasmuch as the primary foundation of a grievance procedure, i.e., the definition of a grievance, is a mandatory subject of bargaining herein, the remainder of the grievance procedure, which necessarily flows from the grievance definition, must also be deemed to be a mandatory subject of bargaining.

Based upon the bargaining history relevant to this disputed provision, it would appear that the Association is willing to negotiate regarding the grievance procedure only so long as the negotiated language is interpreted in a manner the Association finds desirable. In the face of an adverse ruling, the language is suddenly asserted to be no longer negotiable by the Association, despite the clear and unequivocal history of negotiations in the District concerning this language. The District submits that the position assumed by the Association in

the subject case is wholly inconsistent not only with relevant Commission and court rulings regarding the negotiability of grievance procedural language, but also with the bargaining history underlying the language in question and with the equity of a situation in which language negotiated by a party becomes "permissive" upon the occasion of an adverse ruling interpreting such language.

The District submits that a finding that the language at issue is permissive would be tantamount to divesting the Association of any right to file grievances, since the definition of a grievance is so inextricably tied to both individual and Association grievances. In the District's view, this is so because, in the absence of any contractual provision which specifically allows the Association to file Association grievances, no such right will exist, and no Association grievances will be entertained or received by representatives of the District. Accordingly, the Commission should declare these provisions to be mandatory subjects of bargaining and should require the Association to fulfill its statutory duty to bargain on this language. The assertion of the Association, to the effect that it retains some undefined a priori right to process Association grievances, exclusive of any negotiated limitation upon such a right, is both ludicrous and inconsistent with the principles of collective bargaining which have evolved within Wisconsin and other jurisdictions. Such a right to file union grievances, where it exists, must be premised upon a contractual agreement, and where no such contractual agreement exists, there is no right for the union to file such grievances, nor is the employer obligated to process such grievances. The District and the Association, having fulfilled their statutory duty to bargain with regard to the terms of the grievance procedure, should now be bound by the terms negotiated in past agreements, despite the fact that the Hanks award is inconsistent with the Association's desires as to the manner in which it would like to see the language of Article VIII, Section 4.d. interpreted.

As the Commission has previously ruled that grievance procedures similar to that at issue herein are mandatory subjects of bargaining, the District submits that it is now incumbent upon the parties, and the Commission, to adhere to the reasoning of those earlier cases to determine the outcome of this litigation.

DISCUSSION

When determining whether a proposal is a mandatory, permissive or prohibited subject of bargaining, the Commission examines the specific language before it. It is the specific content of the proposal, not its general subject matter, which controls our determination. Thus while the District accurately notes that we have previously found proposals involving grievance procedures to be mandatory subjects of bargaining, such holdings are by no means dispositive unless the specific language in a prior holding is before us herein. Our review of those prior decisions demonstrates that we have not previously ruled upon the bargainable nature of the language before us herein and thus the fact that this dispute focuses upon a "grievance procedure" proposal is not controlling herein.

It is useful to set forth certain relevant statutory and policy considerations before looking at the specific proposal before us. A labor organization enjoying exclusive representative status has standing as a "party in interest" under Sec. 111.07(2)(a), Stats., to file a complaint with the Commission under Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (or Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act) alleging that an employer has violated the parties' collective bargaining agreement. General Drivers & Helpers Union Local 662 v. WERB, 21 Wis.2d 242, 251 (1963); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73). However, where the labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims 2/ because of the presumed exclusivity of the contractual

2/ Exceptions to this policy include instances where (1) the employe alleges denial of fair representation, Wonder Rest Corp., 275 Wis. 273, (1957); (2) the parties have waived the arbitration provision, Allis Chalmers Mfg. Co., Dec. No. 8227 (WERB, 10/67) and (3) a party ignores and rejects the arbitration provisions in the contract, Mews Ready-Mix Corp., 29 Wis.2d 44 (1965).

procedure and a desire to honor the parties' agreement. Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974); United States Motors Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro, supra; City of Menasha, Dec. No. 13283-A (WERC, 2/77). Where the labor organization has bargained an agreement with the employer which does not contain a procedure for final impartial resolution of disputes over contractual compliance but does contain a procedure through which the parties can bilaterally attempt to resolve such disputes, the Commission will assert its breach of contract jurisdiction, American Motors Corp. v. WERB, 32 Wis.2d 237, 249 (1966). Weyauwega Joint School Dist. No. 2, Dec. No. 14373-B (6/77), aff'd, Dec. No. 14373-C (WERC, 7/78), but only if the contractual procedure has been exhausted. Lake Mills Joint School Dist. No. 1, Dec. No. 11529-A (7/73), aff'd, Dec. No. 11529-B (WERC, 8/73); Weyauwega, supra. By requiring exhaustion as a condition precedent to the assertion of jurisdiction, the Commission respects the parties' agreement and enhances the prospects that such disputes will be resolved through the statutorily preferred means of bilateral collective bargaining without need for third party intervention. See, Secs. 111.70(1)(a)(g) and (11.70(6), Stats. Thus, where there is a failure to exhaust a non-binding procedure, a complaint alleging breach of contract will be dismissed. Lake Mills, supra.

The policy bases for the exhaustion requirement noted above are applicable whenever the parties' contractual procedure is potentially available for resolution of the specific type of dispute. Thus, even where the labor organization has bargained a non-binding procedure as to which it has no access absent a willing employe grievant, the Commission will not assert jurisdiction over the labor organization's breach of contract complaint even though the affected individual employe has not utilized the contractual procedure. Joint School District No. 3, Plum City et al., Dec. No. 15626-A (4/78), aff'd, Dec. No. 15626-B (WERC, 5/79). Where the contractual procedure is unavailable 3/ to either the labor organization or the employe as to a specific type of dispute, the Commission is an available forum for resolution of breach of contract claims absent a clear and unmistakable waiver of that statutory right. City of Wauwatosa, Dec. Nos. 19310-19312-A (11/82), modified, Dec. Nos. 19310-19312-C (WERC, 4/84) appeal pending (CirCt Milw.).

The proposal before us herein does not allow the Association to have access to the parties' grievance/arbitration procedure in situations where an individual employe elects not to pursue a contractual dispute by filing a grievance. If the Association were to file a breach of contract complaint with the Commission, the presumption of exclusivity and the desire to honor the parties' contractual procedure which provides for binding impartial resolution of disputes would require a refusal to assert jurisdiction and dismissal of the Association's complaint. 4/ The Association would be left unable to enforce the contract which it bargained, which it is a party to, and as to which it would have an undisputed statutory right to enforce under Sec. 111.70(3)(a)5, Stats., if no grievance/arbitration procedure existed.

The question before us is whether the Association can be compelled to bargain over a proposal which, through operation of the above-recited principles, would leave it potentially unable to enforce the contract. We conclude that the Association cannot be so compelled.

3/ Where the procedure would have been accessible, but for some failure to meet a contractual prerequisite such as a time limit for grievance filing, the Commission, due to the exhaustion requirement previously discussed, would not assert its jurisdiction. In such instances, the procedure would be deemed "available" for the purposes of our analysis herein.

4/ The presence of a grievance procedure in a contract does not deprive the municipal employer of the ability to enforce the contract through a Sec. 111.70(3)(b)4, Stats., complaint proceeding unless the municipal employer has access to the procedure. If the municipal employer has access to a non-binding contractual procedure, it must exhaust same prior to filing a complaint with the Commission. If the municipal employer has access to a contractual procedure which provides for final impartial resolution, then the Commission will not assert jurisdiction over the Sec. 111.70(3)(b)4 complaint.

In Deerfield Community School District, Dec. No. 17503 (WERC, 12/79), aff'd Dec. No. 80-CV-260 (CirCt Dane, 1/81), the Commission was confronted with a proposal which would have (1) waived both parties' ability to bargain for the term of their contract over subjects specifically referred to as covered by the contract and subjects which were proposed during bargaining but not agreed upon and (2) waived both parties' right to bargain during the term of the contract as to bargainable matters which the parties may have been unaware of when they bargained their contract. As parties have a statutory right to bargain during the term of the contract over mandatory subjects of bargaining as to which they were unaware during bargaining and thus did not reach agreement on or have the opportunity to bargain over, and as the second portion of the Deerfield clause would have constituted a waiver of that statutory right, it was found to be a permissive subject of bargaining. The same conclusion was reached in State of Wisconsin, Dec. No. 19341 (WERC, 1/82) under Sec. 111.91 of SELRA.

The proposal before us herein has the same practical effect on the Association as would the Deerfield waiver clause found permissive. In both instances, the collective bargaining representative loses the unconditional ability to exercise a statutory right. We are persuaded that the parallel effect upon a statutory right warrants a parallel finding that the instant proposal is permissive.

We also find persuasive the rationale of the National Labor Relations Board and the Court of Appeals in Bethlehem Steel Co. (Shipbuilding Division), 133 NLRB 1347 (1961), supplemental decision, 136 NLRB 1500 (1962), enf'd in relevant part, 320 F.2d 615 (CA 3, 1963) cert. den., 375 U.S. 984 (1964) and Latrobe Steel Co., 244 NLRB 528 (1979), enf'd in relevant part 630 F.2d 171 (CA 3, 1980). In Bethlelem, the Board and the Court concluded that a grievance procedure which required the affected employes' signature to be on the grievance before it would be processed was a non-mandatory subject of bargaining. The Court commented:

> We turn now to the second aspect of the employer's argument on this point, i.e., the proposal is a mandatory bargaining subject. In accordance with Section 8(d) of the Act, 3/ the Supreme Court has defined mandatory subjects as those within the phrase "wages, hours, and other terms and conditions of employment," NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962); NLRB v. Wooster Division of Borg-Warner Corp., supra. It is clear to us that Bethlehem's proposal does not come within the scope of that phrase. Although at first glance it might appear to be a "condition of employment," actually the effect of the proposal is to limit the union's representation of the employees and not to condition the employees' employment. Cf. NLRB v. Davison, supra.
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> Under Section 9(a) the union is the exclusive representative of the employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 28 U.S.C.A. Section 159(a). Bethlehem's proposal which would restrict the union's role in the prosecution of grievances to those complaints which had been signed by individual employees clearly limits this representation. The company acknowledges the union's rights with respect to the prosecution of grievances, but seeks solace in the proviso of Section 9(a) the right to adjust grievances without the intervention of the representative so long as the adjustment is not inconsistent with the collective bargaining contract.
>
> We find nothing in this section to support the company's position. Indeed, the proviso itself requires that the union be given opportunity to be present at the adjustment. In short, the fact that individual employees have the right to adjust their own grievances does not mean that an employer can restrict the union's statutory rights by requiring that each grievance be signed by the employee involved. Such a limitation is not within the statutory definition of mandatory bargaining subjects. Like the pre-strike ballot clause in Borg-Warner, "it substantially modifies the collective-bargaining system provided for in the statute by weakening the

independence of the 'representative' chosen by the employees. It enables its employer, in effect, to deal with its employees rather than with their statutory representatives." 356 U.S. at 350. As the Board cogently points out in its brief, such a clause would preclude the union from prosecuting flagrant violations of the contract merely because the employee involved, due to fear of employer reprisals, or for similar reasons, chose not to sign a grievance. Hence, redress for a violation would be made contingent upon the intrepidity of the individual employee.

The fact that there are other labor contracts in this industry requiring employee signatures on grievances is not significant. Non-mandatory subjects may lawfully be included in collective bargaining contracts if the parties agree to them. NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. at 349 . . .

3/ "Section 158. Unfair labor practices

. . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C.A. Section 158.

The Municipal Employment Relations Act contains provisions largely parallel in pertinent part to those of the National Labor Relations Act relied upon by the Court in the above-quoted passage. Section 111.70(1)(a), Stats., defines "collective bargaining" as:

> . . . the performance of the mutual obligation of a municipal employer . . . and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment . . . with the intention of reaching an agreement or to resolve questions arising under such an agreement. (emphasis added)

Section 111.70(4)(d), Stats. provides:

> (d) Selection of representatives and determination of appropriate units for collective bargaining. 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employes voting in a collective bargaining unit shall be the exclusive representative of all employes in the unit for the purpose of collective bargaining. Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer. (emphasis added)

The MERA counterpart to the 9(a) provision in the NLRA is found in the above-quoted language and was interpreted by the Commission in School Dist. No. 6, City of Greenfield, Dec. No. 14026-B (WERC, 11/77) in a manner consistent with the Court's analysis in Bethlehem.

In addition to the persuasive Bethlehem analysis, we note that a contractual grievance procedure serves as a mechanism within which the parties exercise their duty to bargain over questions and disputes arising during the term of the contract. Thus, the Sec. 111.70(1)(a), Stats., definition of collective bargaining quoted above includes "questions arising under" a collective bargaining agreement. We agree with the Association that if the labor organization, as the "exclusive representative" (see Sec. 111.70(4)(d), Stats., above) can be compelled to bargain about a grievance procedure which would effectively prevent the representative from triggering the procedure absent a willing employe grievant, the representative's statutory right to bargain would be impermissibly eroded.

In summary, we find that the District's proposal does not primarily relate to wages, hours and conditions of employment because of its potential for rendering the contract unenforceable by a party thereto and undermining the Association's statutory right to bargain as the exclusive representative of employes.

Dated at Madison, Wisconsin this 8th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner