STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of<br><br>MONONA GROVE EDUCATION ASSOCIATION<br><br>Requesting a Declaratory Ruling Pursuant to Sections 111.70(4)(b), and 227.06, Wis. Stats., Involving a Dispute Between Said Petitioner and<br><br>MONONA GROVE SCHOOL DISTRICT | Case 29<br>No. 31728 DR(M)-312<br>Decision No. 22414 |

Appearances:

Kelly, Haus and Katz, Lake Terrace, 121 East Wilson Street, Madison, Wisconsin 53703-3213, by Mr. Robert C. Kelly and Mr. John Halla, appearing on behalf of the Association.

Isaksen, Lathrop, Esch, Hart and Clark, Attorneys at Law, 122 West Washington Avenue, P.O. Box 1507, Madison, Wisconsin 53701, by Mr. Michael J. Julka, appearing on behalf of the District.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On June 13, 1983, the Monona Grove 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 Monona Grove School District over certain matters. Hearing was held on September 29, 1983, in Madison, Wisconsin before Peter G. Davis, a member of the Commission's staff. During hearing, the Association amended its petition to reflect that same was filed under both Sec. 111.70(4)(b) as well as Sec. 227.06, Stats. The parties thereafter filed written argument, the last of which was received on December 5, 1983. The Commission held the matter in abeyance pending the August 23, 1984 completion of briefing in Waupun School District, Dec. No. 22409 (WERC, 3/85), which involved closely related issues. Having reviewed the record and the parties' arguments, the Commission makes and issues the following

## FINDINGS OF FACT

1. That the Monona Grove Education Association, herein the Association, is a labor organization which functions as the collective bargaining representative of certain employes of the Monona Grove School District and has its offices at 412 Woody Lane, Monona, Wisconsin 53716.

2. That the Monona Grove School District, herein the District, is a municipal employer which provides educational services to the residents of the District and has its principal offices at 5301 Monona Drive, Monona, Wisconsin 53716.

3. That the parties' 1981-1983 collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration; and that the Association has no independent access to said grievance-arbitration procedure.

4. That a contractual grievance/arbitration provision which does not provide for independent Association access thereto 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.

5. That the parties' grievance/arbitration procedure, as contained in their 1981-1983 collective bargaining agreement, does not primarily relate to wages, hours and conditions of employment to the extent that it does not permit independent Association access thereto.

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

## CONCLUSIONS OF LAW

1. That a labor organization cannot utilize Sec. 111.70(3)(a)5, Stats., to independently pursue claims of a violation of contract where there exists an agreed-upon contractual procedure for final and binding resolution of disputes arising under a collective bargaining agreement even where the labor organization does not have independent access to that contractual grievance procedure.

2. That, as written, the grievance/arbitration procedure contained in the parties' 1981-1983 collective bargaining agreement is a permissive subject of bargaining within the meaning of Sec. 111.70(1)(a), Stats., because it does not permit independent Association access thereto.

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

## DECLARATORY RULING 1/

That the Monona Grove Education Association has no duty to bargain with the Monona Grove School District within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats., over a grievance procedure which does not permit independent Association access thereto.

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

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, 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)

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.

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(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.

SCHOOL DISTRICT OF MONONA GROVE

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

During hearing, the parties stipulated that the following issues were before the Commission:

> 1. When a labor organization does not have independent access to a grievance procedure which contains final and binding arbitration of unresolved grievances, can that labor organization utilize Sec. 111.70(3)(a)5, Wis. Stats., to independently pursue claims of violation of contract?
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> 2. If not, is an employer proposal which limits the labor organization's access to statutory complaint procedures a mandatory or permissive subject of bargaining?

## POSITIONS OF THE PARTIES

### The Association

The Association notes that the labor organization which functions as the exclusive representative of employes has clear standing to file complaints with the Commission alleging that a municipal employer has violated Sec. 111.70(3)(a)5, Stats. It asserts that the majority bargaining representative is clothed with the duty to fairly represent employes not only in collective bargaining but in contract enforcement as well, and therefore has the legal right to seek to remedy allegations of contractual violation should it feel required to do so. The Association contends that its legal right to file complaints is separate and distinct from any right the employes, individually or in concert with others, have to do the same.

The Association argues that, as a matter of law, it cannot lose its right to enforce contracts under Sec. 111.70(3)(a)5, Stats., unless it has "clearly and unmistakably" waived such rights. The Association asserts that there is no evidence of such a waiver herein. It contends that mere lack of independent access to the contractual grievance procedure does not, without such a waiver, strip the labor organization of its legal right to utilize Sec. 111.70(3)(a)5 in attempting to resolve employe or Association grievances. The Association contends that the District's reliance upon Plum City Joint School District No. 3, Dec. No. 15626-A (4/78), aff'd, Dec. No. 15626-B (WERC, 5/79) for a contrary conclusion is totally misplaced. The Association asserts that the Examiner and the Commission in Plum City found that the Union therein had clearly and unmistakably waived its statutory right to file complaints with the Commission. As there is no evidence of waiver in the instant record, the Association asserts that the Commission should conclude that the Association's lack of independent access to the grievance procedure does not prevent the Association from utilizing the breach of contract remedy provided by Sec. 111.70(3)(a)5, Stats.

Assuming arguendo that it is concluded that the Association has waived its statutory right to utilize Sec. 111.70(3)(a)5, Stats., to enforce the terms of a collective bargaining agreement, the Association asserts that a proposal which denies the Association independent access to such a grievance procedure must be found to be a permissive subject of bargaining. The Association alleges that although a union has the discretion to waive its statutory rights, it cannot be forced to do so. The Association asserts that bargaining demands which would effectively extinguish a union's statutory rights are contrary to public policy and cannot be found to be mandatory subjects of bargaining.

The Association rejects the District's contention that prior inclusion of such a grievance procedure in a collective bargaining agreement somehow makes it a mandatory subject of bargaining. The Association notes that in School District of Wisconsin Rapids, Dec. No. 17877 (WERC, 6/80) the Commission held that "it is well established that the inclusion of permissive subjects in previous collective

bargaining agreements does not convert such issues to mandatory subjects of bargaining." The Association also rejects the District's contention that simply because grievance procedures focusing on violation of contract provisions primarily relate to wages, hours and conditions of employment, it "necessarily follows that preclusion from using this statutory procedure is also a mandatory subject of bargaining." The Association asserts that the District's simplistic equation of contractual grievances and statutory complaints fails to recognize the well established principle that, as a matter of public policy, a majority representative union cannot be compelled to relinquish those rights which have been statutorily conferred upon it to enable it to fulfill its duty of fair representation.

The Association therefore requests that the Commission declare that proposal which would deny the majority labor organization access to a contractual grievance procedure a permissive subject of bargaining.

The District

The District asserts that it is well established that the Commission will not assert its jurisdiction to review the merits of an alleged breach of contract complaint where available contractual procedures for resolving such disputes have not been exhausted and where said exhaustion has not been excused. The District asserts that in Plum City, supra, the Examiner and the Commission applied this "exhaustion" doctrine and concluded that the failure to exhaust the contractual grievance procedures required dismissal of the breach of contract complaint. Here, the District asserts that there is no dispute over the Association's inability to resort to the grievance procedure on its own behalf and that it therefore follows from the Plum City analysis that the Association is precluded by the doctrine of exhaustion from having the Commission take jurisdiction of a complaint wherein the Association alleges violation of Sec. 111.70(3)(a)5, Stats.

While it recognizes that foreclosure from access to the statute is restrictive of the Association's rights, the District asserts that it should be kept in mind that the Association participated in the negotiation of this provision in the collective bargaining agreememt. To allow Association access to Sec. 111.70(3)(a)5, Stats., complaints would, in the District's judgement, require the Commission to either ignore or fail to give full effect to the language in the agreement. Adoption of the Association's position in this matter, would, in the District's view, also result in great prejudice to the District because of the procedural and remedial differences between grievance arbitration and prohibited practice claims. Given the strong public policy favoring the utilization of contractual grievance procedures for the resolution of contractual disputes, the District contends, the Association should be precluded from being in a position to circumvent the contractual procedure by bringing a Sec. 111.70(3)(a)5, Stats., complaint when individual grievants have chosen not to proceed under the contractual grievance procedure. Under Plum City, the District contends that the Association herein has no access to the prohibited practice forum for resolution of breach of contract disputes arising under the parties' current contract and subject to the contractual grievance procedure.

As to the issue of whether a grievance procedure to which the Association has no independent access is a mandatory or permissive subject of bargaining, the District contends that application of the "primarily related" test mandates a finding that such a provision is a mandatory subject of bargaining. The District notes that the Commission has consistently found grievance procedures to be mandatory subjects of bargaining and contends that it necessarily follows that preclusion from using the statutory complaint procedure, which is the practical result of such a proposal, is a mandatory subject of bargaining. The District contends that this must be so because nothing could be more primarily related to wages, hours and conditions of employment than the ability (or inability) to enforce the contract containing the provisions which govern the parties' relationship. The District contends that it cannot perceive any management prerogative or employer discretion which is affected by this proposal and thus argues that the proposal clearly is primarily related to wages, hours and conditions of employment.

As to the Association's argument regarding the appropriate interpretation to be given to the Commission's decision in Plum City, the District asserts that no reference to waiver is found anywhere in the decision of either the Examiner or

the Commission and that it is the exhaustion doctrine as articulated and implemented therein which imposes a restriction upon the exercise of statutory rights by the Association in Monona Grove. The District contends that the result in Plum City may be attributed to the nature of the particular statutory right involved and its relationship to a collective bargaining agreement which has provision for final and binding arbitration of the dispute. The District contends that the exhaustion doctrine is a reflection of the long-standing and strong public policy which favors the utilization of mutually agreed-upon contractual procedures for resolving disputes under a collective bargaining agreement. In cases where a possible statutory claim under Sec. 111.70(3)(a)5, Stats., is potentially resolvable through the grievance procedure, the District asserts that it is good public policy to require that the procedure be utilized, even in the absence of a clear and unmistakable waiver of the Association's right to file a statutory complaint. The District argues that to hold otherwise would be to undermine the utility of the grievance procedure as a preferred mechanism of resolution of disputes arising under the collective bargaining agreement. The District argues that a party should not have the right to forum shop when it has agreed to final and binding arbitration; the statutory procedure should be used as a backstop when there is no binding arbitration procedure available for resolution of a dispute.

DISCUSSION

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 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 exhauston 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 111.70(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

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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).

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, 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.).

As the foregoing indicates, the District's interpretation of Plum City is correct. As in Plum City, it is the application of the exhaustion doctrine which generates the conclusion that where, as here, the parties' contract contains a grievance procedure which is available to employes with breach of contract claims but is not independently available to their collective bargaining representative, the Commission will dismiss the collective bargaining representative's breach of contract complaint.

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. 5/

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

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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 was "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.

5/ We reached a parallel conclusion in Waupun, supra.

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.
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> 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 . . .

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3/ "Section 158. Unfair labor practices

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"(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.

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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 includes "questions arising under" a collective bargaining agreement. If the labor organization, as the "exclusive representative" (see Sec. 111.70(4)(d), Stats. above) can be compelled to bargain over 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 impermissably eroded.

In summary, we find that the District's proposal does not primarily relate to wages, hours and conditions of employment because it renders the contract unenforceable by a party thereto and undermines 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

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner