STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARSHFIELD EDUCATION ASSOCIATION,	:	
Complainant,	:	Case 15 No. 34766 MP-1695
vs.	:	Decision No. 22573-A
MARSHFIELD SCHOOL DISTRICT,	:	
Respondent.	:	

Appearances:

Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Counsel, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of Marshfield Education Association.

Wisconsin Association of School Boards, Inc., by Mr. David R. Friedman, Senior Staff Counsel, 122 W. West Washington Avenue, Room 700, Madison, Wisconsin 53703, appearing on behalf of Marshfield School District.

ORDER INDEFINITELY POSTPONING HEARING PENDING RESULTS OF ARBITRATION

On March 19, 1985 Marshfield Education Association filed a complaint with the Wisconsin Employment Relations Commission, alleging that Marshfield School District had engaged in prohibited practices within the meaning of Section 111.70(3)(a)1 and 4, Stats., by unilaterally establishing the school calendar for the 1985-86 school year. The Commission appointed Christopher Honeyman as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Wis. Stats. On April 8, 1985 the Respondent filed a motion to defer the prohibited practice proceeding to the parties' contractual grievance and arbitration procedure, and on April 22, 1985 the Complainant filed a memorandum in opposition to the motion to defer. The Examiner has considered the arguments of the parties concerning the motion to defer this proceeding to arbitration, and has determined that the purposes and policies of the Municipal Employment Relations Act are served by deferral in this case. The Examiner therefore issues the following

ORDER

IT IS ORDERED that the hearing in this matter be, and the same hereby is, postponed indefinitely pending the results of arbitration between the parties.

Dated at Madison, Wisconsin this 3rd day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

MARSHFIELD SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER INDEFINITELY POSTPONING HEARING
PENDING RESULTS OF ARBITRATION

The complaint alleges that a series of collective bargaining agreements between Complainant and Respondent have provided that school starts two weeks before Labor Day and spring break is five days in length. The complaint alleges that on February 15, 1985, the School Board unilaterally adopted a calendar for the 1985-86 school year which provides that school will not begin until after Labor Day and that the spring break will be only three days in length. Complainant contends that by adoption of this calendar the School Board unilaterally altered the status quo with respect to a mandatory subject of bargaining.

Respondent has not yet filed its formal answer in this matter; in a memorandum supporting its motion to defer to arbitration, however, Respondent contends that the collective bargaining agreement allows the School Board to "finalize" the ensuing calendar prior to February 15 of the current school year. Respondent contends that the collective bargaining agreement covers the issue in dispute, namely whether the School Board had the right to implement a calendar unilaterally, particularly by specifying in its Article IX : "The school calendar is a matter of negotiations and is part of this Agreement. The Board and the Association shall meet to discuss and finalize the school calendar prior to February 15 of the current school year . . . ". Respondent notes that the collective bargaining agreement also provides for a grievance procedure culminating in binding arbitration, and argues that the Commission's policies dictate that this proceeding be deferred to the contractual grievance and arbitration procedure. Respondent contends that the Commission has previously identified several conditions for deferral to arbitration (discussed below) and that in the present case each of these conditions is met. Respondent argues that Complainant's central allegation, that establishing a calendar unilaterally by February 15 violates the statute, could also be construed to be a potential violation of the school calendar clause of the collective bargaining agreement, and that an arbitrator would have the same remedial powers as the Commission if in fact a violation is found.

Complainant contends that the calendar factors of a starting date two weeks before Labor Day and a five-day spring break constitute a "status quo" of at least ten years' duration, and that the action of the District altered the status quo unilaterally. Complainant contends that the collective bargaining agreement does not address what obligations the parties have in the event that they do not agree on a calendar by February 15, and that this question is a statutory issue, within the particular expertise of the Commission rather than that of a private arbitrator. Complainant contends that this matter is distinguishable from the typical deferral situation because it is a refusal to bargain over terms on conditions of employment which will go into effect following the expiration of the agreement, while an arbitrator is confined to interpreting the agreement's terms for the period covered by the agreement.

Complainant further contends that the question of what obligation parties have to bargain a change in a status quo on a school calendar is an important issue of law and policy, which has been cited in the past by the Commission as grounds for declining to defer to arbitration. Complainant argues that an arbitrator is likely to refuse to reach the statutory question involved, and that the arbitration would therefore be a fruitless and inconclusive exercise.

DISCUSSION:

The Commission has identified three conditions for deferral of a prohibited practice complaint to arbitration. These are:

> 1. The parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator.

2. The collective bargaining agreement must clearly address itself to the dispute.

3. The dispute must not involve important issues of law or policy. 1/

The first criterion required by the Commission is adequately addressed by Respondent's statement in its motion that it waives "any and all procedural objections to proceeding to binding arbitration". Complainant, meanwhile, has demonstrated no technical bar to the arbitration.

With respect to the requirement that the agreement must clearly address itself to the dispute, it is apparent from the arguments of the parties that Respondent's defense is fundamentally related to the particular language of this collective bargaining agreement. While the unilateral implementation of a school district calendar could, under appropriate circumstances, constitute a violation of the statute where no language existed governing or relating to the issue, I cannot agree with the Complainant that such language is to be ignored for purposes of deferral questions where it exists. It is clear that whichever forum is to decide the propriety of the Employer's action will have to take into account whether or not the language of the agreement constitutes a form of waiver of further bargaining as of February 15. The arguments made by Respondent are related particularly to this clause of the agreement, and Respondent does not argue that an employer has the blanket right to introduce a calendar unilaterally under any and all circumstances. I therefore conclude that the contractual language is at the center of this dispute. This favors determination by the contractually-agreed mechanism of grievance arbitration.

For related reasons, I do not find that this case involves an important issue of law or policy. The very specificity of the collective bargaining agreement and of the arguments related to the school calendar clause imply that it is unlikely that this case will turn on general statutory principles. In Brown County 2/ the Commission, in deferring to arbitration, stated that:

> The disputed existence of the alleged status quo . . . would be a necessary element in resolving a contractual claim . . . the arbitrator will be squarely faced with whether the County, in fact, deviated from that status quo and, if so, whether it was authorized to do so by the terms of the agreement. Conventional arbitral remedies would also appear likely to suffice in resolving the dispute in a manner not clearly repugnant to the underlying purposes of MERA.

The Commission stated that deferral was appropriate because "there is a substantial probability that submission of the merits of (the) dispute 3/ to that arbitral forum will resolve the claim in a manner not repugnant to MERA."

It is significant, with respect to Complainant's argument that an arbitrator might refuse to decide a specifically statutory question, that in Brown County the Commission stated that a "substantial probability" that the matter could be resolved in arbitration was sufficient to warrant deferral. This, together with the requirement that the arbitrator's award merely be "not repugnant" to the statute, shows that identity of analysis, or of result, is not the test for the appropriateness of deferral. These tests are also consistent with the long-standing policy of not undercutting the method of dispute resolution agreed upon by parties in their collective bargaining agreements. 4/

1/ State of Wisconsin, Department of Administration, Dec. No. 15261 (WERC, 1/78); Brown County, Dec. No. 19314-B (WERC, 6/83).

2/ Supra.

3/ Emphasis in original.

4/ Brown County, supra, at page 13.

For these reasons, I conclude that this matter can and should be deferred to arbitration. Consistent with prior Commission practice, however, I will retain jurisdiction pending the outcome of the grievance and arbitration proceeding, in order to insure that the merits of the issue raised here are resolved in a fair and timely fashion, and in a manner not repugnant to the Act.

Dated at Madison, Wisconsin this 3rd day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner