STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WEST BEND JOINT SCHOOL DISTRICT NO. 1 Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and the WEST BEND EDUCATION ASSOCIATION	Case 51 No. 34339 DR(M)-363 Decision No. 22694

Appearances:

Mulcahy and Wherry, S.C., 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, by Mr. Robert W. Mulcahy, for the District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, for the Union.

ORDER GRANTING MOTION TO DISMISS PETITION FOR DECLARATORY RULING

The West Bend Joint School District, herein the District, having filed a petition with the Wisconsin Employment Relations Commission on December 27, 1984, seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether a voluntary early retirement proposal contained in the District's final offer submitted to the Commission's investigator pursuant to Sec. 111.70(4)(cm), Stats., during collective bargaining with the West Bend Education Association, herein the Association, was a mandatory subject of bargaining; and the Association having on February 28, 1985, filed a motion to dismiss said petition for declaratory ruling; and the parties having filed argument with respect to said motion; and the time for submission of such argument having expired on April 22, 1985; and the Commission having considered the petition, the motion to dismiss, and the parties' respective positions with respect thereto, and being satisfied that the motion to dismiss should be granted;

NOW, THEREFORE, it is

ORDERED 1/

That the instant petition for declaratory ruling is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae 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 (Footnote Continued on Page Two)

1/ (Continued)

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.

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.

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS PETITION FOR DECLARATORY RULING

Background

The 1983-1985 collective bargaining agreement between the District and the Association provided that the parties could reopen the agreement for negotiations on the subject of voluntary early retirement. Pursuant to said reopener, the District and the Association entered into negotiations and on June 26, 1984, the Association filed a petition for mediation-arbitration pursuant to Sec. 111.70 (4)(cm), Stats., in order to resolve an alleged impasse which had arisen. During the negotiations between the parties, the Association had asserted that the District's voluntary early retirement proposal could, if implemented, result in unlawful age discrimination. During the investigation of the Association's mediation-arbitration petition, the parties ultimately exchanged final offers with respect to the voluntary early retirement issue. Thereafter, on December 27, 1984, the District filed a petition with the Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., that the District's own voluntary early retirement proposal was a legal and mandatory subject of bargaining which could properly be included in the District's final offer. The Association subsequently filed a motion to dismiss said petition.

Positions of the Parties

The Association's motion to dismiss contends that since the Association has not filed an objection to the District's voluntary early retirement proposal pursuant to ERB Secs. 31.11 or 31.12, nor taken any other action which would prevent the District from submitting its voluntary early retirement proposal to mediation-arbitration, there is no legitimate "dispute" between the District and the Association "concerning the duty to bargain" with respect to that proposal within the meaning of Secs. 111.70(4)(b) or 4(cm)6.g., Stats. Since there is no legitimate "dispute" with respect to the proposal, the Association asserts that the District has no legal right to obtain a declaratory ruling from the Commission pursuant to Sec. 111.70(4)(b), Stats., and that the Commission has no statutory authority to issue such a declaratory ruling. The Association argues that the District has no legal right to obtain an "advisory opinion" from the Commission under Sec. 111.70(4)(b), Stats., concerning the legality of the District's voluntary early retirement proposal under the Wisconsin Fair Employment Act or the Federal Age Discrimination and Employment Act, in the absence of a "dispute."

The Association further contends that it would be inappropriate and unwise for the Commission to exercise its discretionary jurisdiction under Sec. 227.06, Stats., for the purpose of determining the legality of the District's proposal. The Association asserts that the delay and expense which will result from the standard processing and litigation of the District's petition will unfairly and irreparably damage the Association and the employes represented by it, and will deny them the right to engage in meaningful collective bargaining and to utilize a "fair, speedy, effective" procedure for settling impasses in that bargaining as guaranteed in Secs. 111.70(2) and (6), Stats.

The Association also moves the Commission to issue an order awarding the Association its attorneys' fees and costs incurred as a result of this litigation on the grounds that the District has no reasonable legal basis under Sec. 111.70(4)(b), Stats., to support its petition.

In response to the Association's motion to dismiss, the District asserts that because the issue raised herein is one of determining whether a proposal is a prohibited subject of bargaining, there is a "dispute" as to the duty to bargain which is properly resolved through the District's petition. The District recognizes that under Wisconsin law, it is clear that a party may bargain over a permissive subject of bargaining but is not required to do so. If a party "questions" the status of a proposal as permissive in bargaining but at a later point, when the parties enter mediation-arbitration, does not object to the proposal, the proposal is treated as a mandatory subject of bargaining. In such a case, the District admits that allowing a party who had made the proposal to

file a declaratory ruling petition over a proposal as to which a party had "questioned" but not "objected to" would not be appropriate. The District submits that this is so because the statutory procedure contemplates and specifies that the "permissive" proposal would be treated as being mandatory for the purposes of mediation-arbitration.

The District asserts that the same logic does not and should not follow when a party "questions" the legality of a proposal during the bargaining process, but later fails to formalize that objection in the declaratory ruling. The District alleges the parties may not bargain over an illegal or prohibited subject of bargaining. It asserts that this prohibition is not premised on a party's objection or lack thereof, but rather upon the legal structure of the collective bargaining process. The District argues that a proposal, if illegal, does not lose its character as illegal if the opposing party does not register an objection. Unlike the situation where a party does not object to a permissive proposal during the final offer stage of negotiations, failure to object to an illegal proposal does not render it mandatory. The District submits that such disputes cannot be waived through a failure to object.

The District also notes that if an allegedly illegal proposal is permitted to enter the collective bargaining process, including mediation-arbitration, the question of its mandatory/non-mandatory character may be presented directly to the mediator-arbitrator. The District submits that the consequences for the proponent of the proposal could be devastating inasmuch as the mediator-arbitrator will likely be ill-equipped to determine the mandatory/non-mandatory character of proposals before them. The District submits that such a determination is outside the scope of the mediator-arbitrator's statutory function and is one clearly reserved to the expertise of the Commission under Sec. 111.70(4)(b), Stats.

Contrary to the Association's position, the District submits that it is not asking the Commission to render an advisory opinion on the prospective illegality of the District's own proposal. Instead, the District submits that the Commission is being asked to examine the parties' present duty to bargain in light of the Association's bargaining table contention and only for the limited purpose of determining what proposal may lawfully enter the mediation-arbitration process. The District submits that said function clearly lies within the statutory responsibilities of the Commission.

The District contends that the abuses which the Association alleges would flow from allowing an employer to file a petition for declaratory ruling on its own proposal are mitigated in cases such as this where the proposal at issue had been repeatedly alleged to be illegal by the Association. In such cases, the filing of a petition for declaratory ruling is necessary in the District's view to assure compliance with the intent of MERA that only legal subjects of bargaining enter the mediation-arbitration process and to prevent a classic case of sandbagging. The District submits that the Association is engaging in a perverted strategy aimed at bootstrapping an allegedly illegal proposal into the mediation-arbitration process and then being content to "lay in the weeds" and argue the alleged illegality to the mediator-arbitrator.

The District contends that the allegation of the Association in this case that the proposal is illegal, when combined with a petition filed by the District under the procedures authorized by Sec. 111.70(4)(b), Stats., creates a legitimate and present dispute between the parties, a fundamental dispute which must be resolved by the Commission. Therefore the District requests that the Commission deny the Association's motion to dismiss.

As to the Association's request for attorneys' fees and costs, the District contends that its actions herein are clearly in good faith and justifiable under the facts. The District submits that it does not want to be any part of the collusion of advancing what the Association characterizes as an illegal subject of bargaining into the mediation-arbitration process. The District submits that because the Association has raised the issue, the District has the right to its resolution in the proper forum. The District notes that ERB 18.02 allows petitions to be filed by either a union or employer. The District submits that it would be unconscionable to order attorneys' fees and costs to the Association in a case where it is the Association that has created the dispute. As to the Association's reference to the delays in the mediation-arbitration process which are an unfortunate by-product of a declaratory ruling proceeding, the District

submits that these delays cannot, in this case, be said to fall on the District's shoulders but rather fall on the process itself. The District submits that it has repeatedly indicated its willingness to expedite this matter and notes that the proceeding is not holding up the establishment of an entire master agreement for the employes represented by the Association.

By way of reply, the Association contends that the procedures of Sec. 111.70(4)(b), Stats., are only available to resolve disputes which are obstructing the collective bargaining/mediation-arbitration process. The Association asserts that in the context of this case, only an Association objection pursuant to ERB Secs. 31.11 or 31.12 could create such a dispute. The Association asserts the District's argument that ERB 18.02(1) permits either an employer or a union to file a declaratory ruling petition has absolutely no bearing on either the legal rule that a dispute obstructing the collective bargaining process must exist or the factual questions of whether or not such a dispute exists in this case.

The Association also contends that the District does not "need" a Commission declaratory ruling concerning the "legality" of its proposal in order to adequately respond at any mediation-arbitration hearing to the Association's concerns about the legal ramifications of the implementation of that proposal. The Association submits that the District is not entitled to such "assistance" from the Commission in preparing the District's case for the mediator-arbitrator. It argues that the District has its own legal opinions which presumably are as legally correct and credible as any which the Association may be able to present to the mediator-arbitrator. The Association submits that a Commission determination with respect to the legality of the District's proposal is neither the only or the most appropriate way of eliminating the obstacle to continued processing of the mediation-arbitration petition. The Association notes that dismissing that petition, as requested by it, would also remove said obstacle.

The Association argues that the District's professed concern over violating the law's alleged prohibition against submitting illegal subjects to mediation-arbitration is neither convincing nor a reasonable basis for entertaining the District's petition in this case. The Association asserts that the current state of the law concerning the relationship between voluntary early retirement provisions and federal and state age discrimination statutes is murky and that the respective positions of the parties herein as to the legality of the proposal are neither uncommon nor unreasonable. The Association submits that it raised the issue of legality because it does not wish to be tainted with joint liability should its concerns about the District's proposal turn out to be correct.

The Association also disputes the District's assumption that the law itself creates a legal impediment to an allegedly illegal contract proposal entering the mediation-arbitration process. While the District is correct that an illegal subject of bargaining does not become mandatory by the failure of the Association to object to its bargainability, the Association asserts that absent just such an objection, pursuant to ERB Secs. 31.11 or 31.12, neither the provisions of Sec. 111.70(4)(cm) nor the Commission's rules require that a disagreement over legality be resolved prior to completion of the mediation-arbitration process. The Association also asserts that the law does not forbid the inclusion in a party's final offer of a contract proposal which may be later found to be illegal. The Association submits that it is unaware of any statutory requirement or case authority which would obligate negotiating parties to seek pre-mediation-arbitration "clearance" from the Commission that none of the contract proposals contained in their final offers could possibly be implemented in a manner violative of the law. The Association contends that any such requirement would unreasonably burden the collective bargaining process particularly where, as here, arguable positions presumably exist on both sides of any disagreement about how one party's proposal might relate to statutory obligations or prohibitions.

The Association submits that it is clear that the District is not really interested in obtaining a ruling as to the actual legality of its proposal but rather seeks to reduce the risks concerning the merits of its proposal as presented to the mediator-arbitrator. The Association also submits that even if the Commission were to proceed to find the proposal in question to be legal, such a ruling, while helpful to the District's defense against Association arguments in mediation-arbitration, could not prevent the Association from making those arguments. The Association submits that the Commission's ruling would be neither definitive nor binding, since the Commission lacks statutory authority or expertise in this area.

The Association suggests that it is inappropriate for the Commission to begin to police the bargaining strategies which parties may pursue (provided those strategies are, as in this case, non-obstructing and legally permissible), or to restrict the legitimate arguments which parties may advance in support of their respective contract proposals. For example, the Association would submit that if the Commission were to force the Association to disavow any intention of arguing to the mediator-arbitrator that the District's proposal could be applied so as to illegally discriminate under the basis of age, the Commission would be making an unreasonable and counter-productive policy choice which would force the Association to pay a steep price simply to avoid the delay necessarily caused by the District's petition.

In closing, the Association submits that there are administrative and policy dangers inherent in permitting the District to proceed with its petition in this case. Where the mediation-arbitration process is not being obstructed by the theories and arguments as to legality of a proposal, the Association submits that a declaratory ruling proceeding is not an appropriate forum to resolve any issue as to a proposal's legality.

Discussion

The issue before us is one of determining whether the mediation-arbitration process should be interrupted where a party files a petition for declaratory ruling under Sec. 111.70(4)(b), Stats., as to its own proposal because the opposing party has expressed doubts about but not "objected" to the proposal's legality.

In Milwaukee Board of School Directors, Dec. No. 17504 (WERC, 12/79), the Commission held that it was not required to issue a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., where a "question" arose during collective bargaining as to the bargainability of a proposal unless there was also a "dispute" within the meaning of Sec. 111.70(4)(b), Stats. More specifically, we stated:

> Section 111.70(4)(b) Stats., provides that the Commission is required to issue a declaratory ruling whenever a dispute arises between a municipal employer and a union of its employes over the duty to bargain on any subject. That provision, which provides that decisions should be issued within fifteen days of submission, obviously contemplates disputes which obstruct the collective bargaining process which now includes mediation-arbitration. We cannot accept MTEA's claim that the legislature, in enacting Section 111.70(4)(cm) 6. g. Stats., intended to provide that the mediation-arbitration process could be interupted by the filing of a petition pursuant to Section 111.70(4)(b) Stats., because a "question" arose in collective bargaining which was not also a "dispute" within the meaning of Section 111.70(4)(b) Stats. To conclude otherwise would be to allow a party who had made a proposal in bargaining, the mandatory nature of which the other party "questioned" but did not "object to" under Section 111.70 (4)(cm) 6. a. Stats. and ERB 31.11 Wis. Admin. Code, to delay the mediation-arbitration process by the simple expedient of filing a petition for declaratory ruling.

As can be seen from the foregoing analysis, the Commission has already generally concluded that the legislature did not intend to allow a party to delay the mediation-arbitration process by obtaining a declaratory ruling on its own proposal. While we do not question the District's good faith 2/ in filing the instant petition to discover whether our broad holding in Milwaukee was applicable where a party questions but does not object to the legality of a

---

2/ We therefore need not address the Association's claim that it should receive attorneys' fees and costs on the grounds that this action is allegedly frivolous or in bad faith.

proposal, we do not find the permissive/prohibited distinction posed by the District to be a basis for reaching a different conclusion from that set forth in Milwaukee.

As a broad matter of policy, it is clear from the terms of Sec. 111.70(6), Stats, that the legislature intended the procedures to which parties have statutory access for resolution of collective bargaining disputes to be ". . . fair, speedy, effective and, above all, peaceful . . ." (emphasis added) Because interruptions of statutory dispute resolution mechanisms run contrary the expressed interest in speed, the legislature took careful steps to minimize allowable interruptions of the mediation-arbitration process. Thus, for instance, it is specified in Sec. 111.70(4)(cm)6.e., Stats., that "mediation-arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time." Even a party's right to challenge the content of the opposing party's final offer as being non-mandatory is limited. Section 111.70(4)(cm)8, Stats., requires that the Commission adopt rules applicable to the mediation-arbitration procedure. Pursuant to this statutory directive, the Commission inter alia adopted, without legislative objection, ERB 31.12(3) which specifies that a declaratory ruling petition alleging that a proposal that is "non-mandatory" must be filed within a certain time period or ". . . the proposals involved therein shall be treated as mandatory subjects of bargaining." (emphasis added) ERB 31.11, entitled "Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining," also clearly specifies that if the mediation-arbitration procedure is to be interrupted by duty to bargain disputes, the objections and petitions for declaratory ruling are to be directed at "a proposal or proposals by the other party . . ." (emphasis added) See ERB 31.11 (a) and (b).

Given the foregoing, we conclude that only duty to bargain disputes which involve one party challenging another party's final offer are "disputes" within the meaning of Sec. 111.70(4)(b), Stats., which interrupt the mediation-arbitration process. We see no basis for an exception for allegedly prohibited proposals. The rules of the Commission referenced above speak to challenges that another party's offer contains "non-mandatory" proposals, a term which encompasses both permissive and prohibited subjects of bargaining within its scope. This parallel treatment in our rules of allegedly permissive and prohibited subjects of bargaining as they relate to the mediation-arbitration process is consistent with Sec. 111.70(4)(cm)6.g., Stats., which specifies that the same declaratory ruling procedure is applicable to allegedly permissive and prohibited proposals.

In resolving the matter on the basis of the above interpretations, we are not overlooking the thoughtful arguments the parties have presented concerning the overall efficacy and fairness of the statutory dispute resolution process. In that regard, we consider the primary role of the declaratory ruling processes as regards scope of bargaining under mediation-arbitration to be to resolve disputes about what issues should be permitted to reach the mediator-arbitrator, rather than to assure that every final offer is free of language that could potentially be implemented in a manner that might ultimately be determined by an appropriate forum to be illegal and unenforceable.

Here the District has proposed language which it asserts is free of illegality, and the Association is willing to proceed to mediation-arbitration with that employer proposal among those to be weighed by the mediator-arbitrator. The mediator-arbitrator is not required by the statute to determine whether a subject is mandatory or prohibited, but rather must compare the reasonableness of the two final offers as a whole giving weight to the statutory criteria. Whether the Association's legal arguments will be deemed meritorious by the mediator-arbitrator, or if deemed meritorious will be given any weight by the mediator-arbitrator, and if given any weight will be outcome-determinative in the award are, in our view, risks that the process imposes on the proponent of the language in circumstances such as those present here. If the District prefers to avoid those risks it can, of course, modify its proposal to reduce or eliminate them.

The Association, of course, runs the risk that the District will buttress its arguments in support of the lawfulness of the proposal with arguments to the mediator-arbitrator that the Association could have and did not object and seek a

declaratory ruling on the matter from the Commission and/or that the Association or others claiming to be adversely affected by the language will have subsequent post-award opportunities in other forums that are perhaps more experienced with or better able to address the legal issues regarding the resultant contractual provision in proceedings brought to have that provision declared illegal and unenforceable.

Given the foregoing, we have dismissed the District's petition.

Dated at Madison, Wisconsin this 29th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner