STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WISCONSIN EDUCATION ASSOCIATION COUNCIL, Involving the Professional Education Unit of Employes of THE STATE OF WISCONSIN.	Case 230 No. 35810 SE-91 Decision No. 23648

Appearances:

Mr. Stephen Pieroni, Staff Counsel, 101 West Beltline Highway, P. O. Box 8003, Madison, WI 53708, appearing on behalf of the Petitioner, Wisconsin Education Association Council.

Shneidman, Myers, Dowling, Blumenfeld & Albert, Attorneys at Law, P. O. Box 442, Milwaukee, WI 53201-442, by Mr. Timothy Hawks, appearing on behalf of the Intervenor, State of Wisconsin Education Professionals, AFT-WFT, Local 3271, AFL-CIO.

Ms. Barbara Buhai and Ms. Susan Sheeran, Division of Collective Bargaining, Department of Employment Relations, 137 East Wilson Street, P. O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Employer, the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS PETITION FOR ELECTION

The Wisconsin Education Association Council (herein WEAC) having, on October 11, 1985, filed with the Wisconsin Employment Relations Commission (herein Commission), a petition requesting that the Commission conduct an election in the professional education bargaining unit of employes of the State of Wisconsin (herein State), to determine whether said employes desire to be represented for the purpose of collective bargaining by WEAC; and the State of Wisconsin Education Professionals, AFT-WFT, Local 3271, AFL-CIO (herein WFT), having been permitted to intervene in the matter by virtue of its status as existing representative of said unit; and WFT having, on December 16, 1985, submitted a Motion requesting that WEAC's petition be dismissed as untimely; and the Commission having designated Daniel J. Nielsen, an examiner on its staff, to conduct a hearing in the matter; and, following several postponements mutually requested by the parties, a hearing on the Motion having been held on February 10, 1986, in Madison, Wisconsin, at which time the parties submitted such evidence as was relevant to the Motion; and a transcript of said hearing having been received by the Examiner on February 14, 1986; and WEAC and WFT having sumitted briefs and reply briefs on the Motion by March 24, 1986; and the State having chosen not to file briefs in the matter; and the Commission, having considered the evidence and arguments and being fully advised in the premises, hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Wisconsin Education Association Council is a labor organization with a mailing address of 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin, 53708.

2. That the State of Wisconsin Education Professionals, AFT-WFT, Local 3271, AFL-CIO, is a labor organization with a mailing address of 2021 Atwood Avenue, Madison, Wisconsin, 53704.

3. That the State of Wisconsin is the employer; and that the State's representative for the purposes of collective bargaining is the Department of Employment Relations, with a mailing address of 137 East Wilson Street, P. O. Box 7855, Madison, Wisconsin, 53707-7855.

4. That WFT is the exclusive collective bargaining representative of the statutory professional education unit of State employes, which unit is comprised of persons in the following classifications:

Archivist 1
Archivist 2
Archivist 3
Archivist 4
Archivist 5
Archivist 6
Children's Hearing Specialist
Curator 1
Curator 2
Curator 3
Curator 4
Curator 5
Curator 6
Education Consultant
Education Specialist 1
Education Specialist 2
Education Specialist 3
Education Specialist 4
Education Specialist 5
Education Specialist 6
Educational Services Asst. 1 -Education
Educational Services Asst. 2 -Education
Educational Services Asst. 3 -Education
Educational Services Asst. 4-Education
Educational Services Intern-Education
Librarian 1
Librarian 2
Librarian 3
Library Associate 1
Library Associate 2
Library Consultant 1
Library Consultant 2
Local History Coordinator
School Administration Consultant
School Food Services Specialist 1
School Food Services Specialist 2
Teacher 1
Teacher 2
Teacher 3
Teacher 4
Teacher 5
Teacher 6

excepting all project, confidential, limited term, management, supervisory, sessional, and all other employes of the State of Wisconsin.

5. That the State and WFT were parties to a collective bargaining agreement providing, in part, as follows:

ARTICLE XV
Termination of Agreement

333 The terms and conditions of this Agreement shall continue in full force and effect commencing on March 8, 1984, and terminating on June 30, 1985, unless the parties mutually agree to extend any or all of the terms of this Agreement. Upon termination of the Agreement, all obligations under the Agreement are automatically cancelled except that the provisions of the grievance procedure shall continue in effect for such period of time as is necessary to complete the processing of any grievance presented prior to the termination of the Agreement.

that, prior to June 27, 1985, the negotiating teams representing the State and WFT met ten times for the purpose of bargaining over a successor contract; that James Cavanaugh was the chief spokesperson for the WFT, and Susan Sheeran was the principal spokesperson for the State in these negotiations; that, as of June 27, 1985, no agreement had been reached on a successor contract; that, on June 27, 1985, Sheeran and Cavanaugh executed the following agreement:

EXTENSION OF EXISTING COLLECTIVE BARGAINING AGREEMENT

between the

STATE OF WISCONSIN

and the

STATE OF WISCONSIN EDUCATION PROFESSIONALS LOCAL 3271, WFT-AFT

The above-named parties to the Agreement covering the Professional Education bargaining unit and effective for the period March 8, 1984, to June 30, 1985, hereby agree to extend said Agreement effective July 1, 1985, subject to the following terms and conditions:

1. There will be no increase in pay until a new Agreement is reached.

2. This extension Agreement is in no way to be interpreted as an agreement by the State to grant any form of retroactivity nor as a waiver by the Union of its rights to bargain regarding the subject of retroactivity.

3. Local Agreements negotiated pursuant to the master contract are extended effective July 1, 1985 on the same terms and conditions as the extension of the master contract.

4. This extension Agreement may be terminated by either party, giving the other party ten (10) calendar days' written notice of termination.

Dated this 27th day of June, 1985.

Susan Sheeran /s/	James A. Cavanaugh /s/
Susan Sheeran	James Cavanaugh
Chief Spokesperson	Chief Spokesperson
State of Wisconsin	State of Wisconsin
Department of Employment Relations	Education Professionals Local 3271, WFT-AFT

that agreement on an agreement with a nominal expiration date of June 30, 1987, was reached on October 18, 1985; that that agreement was ratified by the membership of the WFT on November 16, 1985; and that the agreement was ratified by the State Legislature, meeting in special session, and was published as 1985 Wisconsin Act 108 on Wednesday, December 4, 1985.

6. That WEAC filed the instant petition for election on October 11, 1985, seeking an election in the unit set forth in Finding of Fact 4, above, to determine whether a majority in that unit wished to be represented by WEAC.

7. That WFT was permitted to intervene in the proceeding and, on December 16, 1985, submitted a Motion to Dismiss the Petition, alleging that WEAC's petition was untimely; that WEAC opposes the motion, contending that its petition is timely; and that the State takes no position on the question of timeliness of the petition.

8. That since the effective date of the creation of Secs. 111.92(3) and (4), Stats., negotiations between the State and the exclusive representatives of bargaining units of its employes have all resulted in collective bargaining agreements containing nominal termination dates coincident with the last day of the biennium.

CONCLUSION OF LAW

That the petition filed herein by WEAC was not timely filed within the meaning of SELRA and does not give rise to a question concerning representation within the meaning of Sec. 111.83(3), Stats.

ORDER 1/

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.

(Footnote 1 continued on page 4.)

(Footnote 1 continued from page 3.)

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.

That the petition filed herein by WEAC shall be and hereby is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING MOTION TO DISMISS PETITION FOR ELECTION

PORTIONS OF THE WISCONSIN STATUTES

. . .

STATE EMPLOYMENT LABOR RELATIONS

. . .

111.83 Representatives and elections. (1) A representative chosen for the purposes of collective bargaining by a majority of the state employes voting in a collective bargaining unit shall be the exclusive representative of all of the employes in said unit for the purposes of collective bargaining. Any individual employe, or any minority group of employes in any collective bargaining unit, may present grievances to the state employer in person, or through representatives of their own choosing, and the state employer shall confer with said employe in relation thereto if the majority representative has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the state.

. . .

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the commission shall determine the representative thereof by taking a secret ballot of the employes and certifying in writing the results thereof to the interested parties and to the state and its agents.

. . .

(5) While an agreement between a labor organization and an employer is in force under this subchapter, a petition for election may only be filed during October in the calendar year prior to the expiration of such agreement. An election held pursuant to such petition shall be held only if the petition is supported by proof that at least 30% of the employes desire a change or discontinuance of existing representation.

. . .

111.92 Agreements. (1) Tentative agreements reached between the department of employment relations, acting for the executive branch, and any certified labor organization shall, after official ratification by the labor organization, be submitted to the joint committee on employment relations, which shall hold a public hearing before determining its approval or disapproval. If the committee approves the tentative agreement, it shall introduce in a bill or companion bills, to be put on the calendar or referred to the appropriate scheduling committee of each house, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law. Such bill or companion bills shall not be subject to ss. 13.093(1), 13.50(6)(a) and (b) and 16.47(2). The committee may, however, submit suitable portions of the tentative agreement

to appropriate legislative committees for advisory recommendations on the proposed terms. The committee shall accompany the introduction of such proposed legislation with a message that informs the legislature of the committee's concurrence with the matters under consideration and which recommends the passage of such legislation without change. If the joint committee on employment relations does not approve the tentative agreement, it shall be returned to the parties for renegotiation. If the legislature does not adopt without change that portion of the tentative agreement introduced by the joint committee on employment relations, the tentative agreement shall be returned to the parties for negotiation.

(2) No portion of any tentative agreement shall become effective separately.

(3) Agreements shall coincide with the fiscal year or biennium.

(4) It is the declared intention under this subchapter that the negotiation of collective bargaining agreements and their approval by the parties should coincide with the overall fiscal planning and processes of the state.

. . .

BACKGROUND

WFT has been, since February 7, 1974, the certified exclusive bargaining representative for Education Professionals employed by the State of Wisconsin. (Dec. Nos. 11884-F and 11885-F (WERC 2/74)). On September 28, 1975, the State and WFT entered into their first collective bargaining agreement covering these employes. That agreement contained a nominal expiration date of June 30, 1977, as well as a provision allowing extension of the agreement by mutual consent of the parties. Each subsequent agreement has contained a duration clause with a nominal expiration coincident with the end of the State biennium and a provision for extension by mutual consent. Both the biennium-long duration clause and the option to extend by mutual agreement have been standard clauses in all State labor contracts. In four of the five rounds of negotiations since the initial contract the State and the WFT have not reached agreement prior to nominal expiration. 2/ In each of those four instances, the parties have mutually agreed to extend the contract. With two exceptions, 3/ that has been the pattern for other State negotiations as well.

Negotiations over the successor to the 1983-85 agreement were commenced in early spring of 1985. The parties met for direct negotiations on ten occasions without reaching agreement, and the extension agreement was entered into on June 27, 1985. Overall tentative agreement on a contract with a nominal expiration date of June 30, 1987, was reached on October 28, 1985. That contract was ratified by the Union, the Joint Committee on Employment Relations, both houses of the State Legislature and signed by the Governor. It became effective upon publication on December 5, 1985.

On October 11, 1985, WEAC filed the instant petition for election, and WFT filed the instant Motion to Dismiss the petition as untimely on December 16, 1985.

2/ The 1985-87 contract was entered into on December 5, 1985 (Intervenor's Exh. #1); the 1983-85 contract on March 8, 1984 (Int. Exh. #2); the 1981-83 contract on October 25, 1981 (Int. Exh. #3); the 1979-81 contract on September 20, 1979 (Int. Exh. #4); the 1977-79 contract on May 26, 1977 (Int. Exh. #5).

3/ The State Engineers Association refused to enter into an extension of the 1979-81 contract prior to June 30, 1981, and the State refused to extend the contract after that date because of the State view that an extension can be lawfully entered into only prior to expiration of the enabling duration clause. The Wisconsin State Employees Union, Council 24, AFSCME, cancelled the extended contract on July 5, 1977 and called a strike. (Testimony of Jerome Nelson, Division of Collective Bargaining, Transcript, pages 35-36.)

POSITIONS OF THE PARTIES

WFT's Initial Brief

In its initial brief WFT advances the following four reasons why the June 27, 1985, extension agreement should be deemed a bar to WEAC's petition, rendering the petition untimely.

First, WFT maintains that WEAC's petition is untimely when measured against the requirement of Sec. 111.83(5), Stats., that a petition be filed in the October preceding expiration when an agreement is in effect. In the instant case, the parties agreed to and the Legislature adopted an agreement providing for expiration on June 30, 1985, "unless the parties mutually agree to extend" the contract. By its own terms, the agreement would not "expire" so long as an extension agreement was in effect. Thus WFT asserts, the agreement was in effect when the petition was filed and a petition could only have been timely filed in October of the preceding year. Calculated from either the nominal expiration date of the contract, or from the actual expiration of the extension agreement, WEAC's petition had to have been filed in October of 1984 in order to be timely. Since WEAC's petition was filed in 1985, it must be dismissed as untimely under Section 111.83(5), Stats.

WFT's second argument is that the underlying purpose of a contract bar, that of promoting stability in collective bargaining by allowing for a reasonable period of time for negotiation, is best served by viewing the extension agreement as a valid bar. WFT notes that the process of contract negotiation under SELRA is almost invariably drawn out, with agreement rarely being achieved prior to the nominal expiration date of the existing agreement. In the face of the complex negotiation and ratification procedures mandated by SELRA, it is reasonable and appropriate to allow the negotiating parties the protection of the contract bar when they most need it -- after nominal expiration but before agreement. WFT stresses that allowing the extension agreement to bar the petition would not deny WEAC an opportunity for election, since a petition would in any event be timely in October of every even numbered year including 1986. In that way, the policy of promoting stable bargaining can be reconciled with the equally important policy of allowing free choice of representatives, without unduly favoring one over the other.

The third argument of the WFT is that by ch. 238, Laws of 1975, the Legislature changed the Sec. 111.83(5) filing window to October of the year preceding agreement expiration from the 90 to 60 day period preceding same. WFT argues that amendment was intended to insure that the parties to an agreement have notice of a challenge to the representative's majority status prior to negotiations. By allowing the question concerning representation to be raised well before expiration, the Legislature sought to avoid precisely the problems posed by WEAC's petition in this case. If WEAC is allowed to draw into question WFT's majority status after eight months of negotiations (negotiations which led to an agreement only five working days after the petition's filing), the orderly process of collective bargaining is completely disrupted. Thus, concluding that the extension agreement bars the instant petition would be consistent with the Legislature's intent in amending Sec. 111.83(5).

Finally, WFT asserts that the conditions in State bargaining so differ from either municipal sector or private sector bargaining that the contract bar doctrine in State sector cases should allow indefinite extensions to serve as a bar. WFT acknowledges that under municipal and private sector case law an indefinite extension will generally not bar a petition, such that under the case law in those sectors WEAC's petition might be timely if the Commission viewed the extension as a separate agreement rather than as conclusive evidence that the 1983-85 did not expire on June 30, 1985. The special SELRA provisions of Sec. 111.92(3) and (4), however, require that negotiations and agreements coincide with the fiscal timetable and processes of the State. This insures that any agreement must nominally expire at or by the end of the biennium, guaranteeing a window for filing petitions at least once every two years. Thus treating an extension agreement as a bar will not seriously prejudice any petitioner's rights. Again stressing the very involved and time-consuming procedural restrictions on the negotiation and ratification of labor agreements under SELRA, WFT urges that the rationale underlying the Commission's refusal to recognize extension agreements in other sectors need not and should not be adopted in cases under SELRA.

WEAC'S Initial Brief

WEAC asserts that Section 111.83(5), on its face, restricts the filing of a petition only while "an agreement between a labor organization and an employer is in force . . ." Nowhere in that subsection or elsewhere in SELRA is there any restriction on the time for filing when the parties' agreement has expired. WEAC argues that the 1983-85 agreement expired on June 30, 1985, and that the June 27, 1985 extension agreement is not sufficient to be a contract bar under 111.83(5), Stats.

WEAC notes that the predecessor to the current Sec. 111.83(5), Stats., provided that:

> "While an agreement . . . is in force . . . a petition for election may only be filed not more than 90 days nor less than 60 days prior to the expiration of such agreement."

This, WEAC asserts, was consistent with the standard contract bar doctrine as developed by the National Labor Relations Board and (with immaterial differences) with that developed by the Commission, as well. By its adoption in Sec. 111.83(5) of the conventional contract bar doctrine, the Legislature must be assumed to have intended to also adopt its other features, including the right to file at any time after agreement expiration.

WEAC argues that Section 111.92, Stats., requiring that bargaining and the fiscal processes of the State must coincide, cannot reasonably be read as having any impact on the right to file petitions for election because the rules relating to bargaining can only come into play after bargaining rights have been secured. The objectives of Sec. 111.92 cannot be said to be frustrated by honoring the right of employes to free choice under Sec. 111.83, since the exercise of those rights is a pre-condition to negotiation of any agreement. WEAC asserts that conducting an election (and thus giving full effect to the rights of State employes) in no way precludes compliance with Sec. 111.92, since following an election WEAC can negotiate an agreement which coincides with the fiscal year or biennium as required by Sec. 111.92(3) and WEAC can conduct the negotiations in a manner which coincides with the overall fiscal planning and process of the State as required by Sec. 111.92(4). Therefore, nothing in Sec. 111.92 should preclude processing the petition for election under Sec. 111.83.

WEAC asserts that WFT's contention that public policy supports application of a contract bar in this case is without merit. While WEAC acknowledges that a great deal of bargaining may go for naught if WFT were displaced, pursuant to the instant petition, this is not a consideration unique to State sector bargaining. In both the municipal and private sectors this possibility is present and is considered a reasonable trade-off to protect employe rights to free determination. There is no credible public policy argument to be made for a different balance being struck in the State sector.

Finally, WEAC maintains that this case turns on whether the extension agreement constitutes a contract bar, and that well-established Commission and NLRB case law answer that question in the negative. Only a complete agreement may bar an election, and by its very nature the extension agreement is not a complete agreement. Instead, it is a stopgap measure of indefinite duration, the sole purpose of which is to maintain the contractual status quo during the hiatus. Allowing the parties to use such an agreement as a bar, WEAC asserts, invites a nervous incumbent to stall bargaining in order to put off an election, all the while enjoying the protection of the extension agreement. This unduly interferes with the right of State employes to an election.

WFT's Reply Brief

WFT argues that WEAC ignores the realities of State sector bargaining and that deeming the instant petition timely would effectively deny the State and WFT an adequate insulated period for negotiations. The extension agreements utilized by the State and the representatives of its employes cover the period when meaningful collective bargaining takes place. A contract bar doctrine that does not take cognizance of this fact will not serve its underlying purpose.

In State employment, WFT notes, the employes have neither recourse to interest arbitration nor the right to strike. Thus the expiration of the contract in the State negotiations has a different meaning than in the other sectors. In

the municipal sector, extension agreements are largely unnecessary; and in the private sector, expiration signals destabilization of the bargaining relationship such that allowing a petition to be timely filed in the face of an extension agreement cannot further harm the already destabilized relationship.

In State sector negotiations, on the other hand, the expiration of the agreement and execution of an extension signal the continuation of good faith bargaining. This is the process that the contract bar is designed to protect, and it must be crafted in this case so as to reach that objective. WFT notes that, while the contract bar in both private and municipal sectors would generally allow a petition for election to be filed once every three years (assuming three year contracts), the petitioner under SELRA is guaranteed a window at least once every two years. Allowing the extension agreement in this case to bar the petition yields a result maximizing the opportunities for good faith bargaining, while still providing a more liberal guarantee for petitioners than in any other sector.

As a practical matter, WFT argues, WEAC's interpretation would allow a raider to force termination of bargaining by drawing into question the majority status of the incumbent. This permits the raiding organization to use the very lack of progress in negotiations that its' petition could bring about as a weapon against the incumbent in the election campaign. This would be unfair and open to manipulation.

Finally, WFT takes issue with WEAC's assertion that the Legislature intended to adopt the private or municipal sector contract bar doctrine in effect in those sectors when it adopted SELRA. The contract bar under NLRA and MERA is an administrative creation, not a statutory mandate. The Legislature would have remained silent on the subject had it intended the same principles to apply to SELRA. Instead, Sec. 111.83(5) was adopted in derogation of the case law in the other sectors, in that it expressly provides what is to be the exclusive opportunity for a petition challenging an existing representative's status. At the time the predecessor to the current Sec. 111.83(5), provision was adopted, the existence of a labor agreement was only one of several factors considered by the Commission 4/ in determining whether a petition was barred. The Legislature, however, made existence of an agreement the sole pre-condition to a bar under SELRA. Since there can be no dispute that an agreement existed in this case when the petition was filed, the sole statutory pre-condition to a bar established by the Legislature has been met, and the petition should be dismissed as untimely.

WEAC's Reply Brief

In reply to WFT's initial brief, WEAC notes that Sec. 111.83(5) speaks of a situation when an agreement is in force, thereby implying that there will also be times when an agreement is not in force. Under WFT's interpretation, there would never be a time when an agreement is not in force. Therefore, WFT's interpretation must be rejected as inconsistent with the plain meaning of SELRA as well as for the other reasons previously advanced by WEAC.

DISCUSSION

The motion calls for a determination of whether the petition filed in October of 1985 is timely filed under SELRA. It involves a matter of first impression under SELRA.

4/ Citing the following analysis in Appleton Public Schools, Dec. No. 9045 (5/69):

> The absence of any bilateral document, the uncomprehensive nature of the only pertinent resolution by the Municipal Employer, the tentative nature of the understanding reached due to its dependence on other negotiations, the indefinitely self-renewing feature apparent in the last paragraph quoted from the documents cited by the intervenor, and the record as a whole, combine to convince the Commission that no agreement of sufficient substance existed so as to constitute a bar . . .

Upon consideration of the evidence and arguments presented, we are persuaded that dismissal of the instant petition as untimely is the outcome most consistent with both the language of SELRA and the legislative purposes underlying it. Indeed, in our view, that is the proper outcome whether or not Sec. 111.83(5) is deemed applicable in the instant circumstances.

Clearly, the instant petition is untimely filed if Sec. 111.83(5) is deemed applicable to the instant circumstances since it was not filed in October of the calendar year preceding either the nominal expiration date of the 1983-85 agreement or the actual end date of the June 27, 1985 extension agreement.

If, on the other hand, Sec. 111.83(5) does not apply to election petitions filed outside of the nominal term of an agreement apart from any mutually agreed upon extension, then neither Sec. 111.83(5) nor any other provision of SELRA would specify at what other times, if any, a petition would or would not be timely. In the absence of a specific statutory provision on the question, and given the unusual statutory and institutional realities of State bargaining--including the requirement of Sec. 111.92(3) and the explicit statement of legislative intent in Sec. 111.92(4)--we find it appropriate to apply the balancing test used by the Commission and its predecessor Board in the municipal sector while gaining experience upon which to base its later more specific caselaw rules regarding timeliness of representation petitions challenging an incumbent representative. That general balancing test approach was described in Whitewater Unified School District, Dec. No. 8034 (WERB, 5/67) as follows:

> The Board, in entertaining petitions for elections to be conducted among municipal employes, must balance the right of the employes to select and change their collective bargaining representation with the interest of preserving the stability of a collective bargaining relationship. In attempting to achieve this balance, the board examines many factors, only one of which is an existing agreement between the municipal employer and the recognized bargaining representative. In addition in municipal employment, the board must consider budget and teacher contract deadlines, bargaining history, the opportunities the employes have had to select their representative, and any other factor which affects the stability of the relationship between the employes, their chosen representative, and the municipal employer. 5/

When the above-noted balance is struck in the institutional and statutory contexts of State sector bargaining, we conclude that, absent extraordinary circumstances not present herein (such as a schism within the existing representative or abandonment of the unit by the representative), petitions challenging an existing representative under SELRA are timely filed only if filed in October of the year preceding the nominal expiration of an existing agreement or, in any event, in October of the year preceding the end of the biennium.

In our view, that interpretation best serves the declared legislative intention "that the negotiation of collective bargaining agreements and their approval by the parties should coincide with the overall fiscal planning and processes of the state." That quoted statement in Sec. 111.92(4) indicates the high priority the Legislature has placed on avoiding developments in collective bargaining relationships that would interrupt or interfere with the quoted objective. In Ch. 238 Laws of 1975, the Legislature emphasized the importance it attaches to insulating the negotiation and agreement approval processes from interruption or interference due to the representation election process by lengthening the time period between the statutory petition filing window and the expiration date of an existing agreement.

5/ Id. at 6. See generally, Wauwatosa Schools, 8300-A (WERC, 2/68), City of Milwaukee, Dec. No. 9172 (WERC, 7/69), Dunn County, Dec. No. 17681 (WERC, 6/80), City of Prescott (Police Department), Dec. No. 18741 (WERC, 6/81), Oconto County (Sheriff's Department), Dec. No. 21847 (WERC, 7/84), Marinette County, Dec No. 22102 (WERC, 11/84) and Menominee County (Highway Department, Sheriff's Department, Courthouse and Human Services Board), Dec. Nos. 23352-23355 (WERC, 3/86) refining the MERA case law principles governing timeliness of petitions for election petitions challenging an incumbent representative.

To treat the instant petition as timely would mean that a representation petition would always be timely if filed after the nominal expiration 6/ of an agreement. In our view, adoption of that interpretation of SELRA would pose a threat to the orderly agreement negotiation and approval process that Sec. 111.92(5) seeks to protect because it would impose undue pressures on the incumbent organization during critical times in the negotiation and agreement approval processes and because it would potentially inject a new representative with different bargaining priorities into the negotiations process at a point well into that process. Those and other potential consequences of deeming timely a petition for election filed after the nominal expiration date in a SELRA agreement appear likely to interfere with or interrupt the processes that the Legislature has taken pains to insulate.

The interest of stability of the existing relationship and of consistency of negotiations with the fiscal and budget planning processes of the State has its limits, however. Clearly, an existing representative cannot be permitted to remain free indefinitely from the possibility of a timely filing of a petition challenging its' representative status.

Therefore, in the event that an existing representative and the State do not complete the negotiation and agreement approval process in time to render timely under Sec. 111.83(5) a petition filed during October of the year preceding the end of the biennium following the nominal expiration date of the incumbent's last agreement, we would deem a petition filed in that month to be timely in order to prevent the perpetual unavailability of a petition filing window. In that way, we would provide as much protection as possible for the Sec. 111.92(4) Legislative objective noted above while guaranteeing, at a minimum, a window of opportunity for timely challenging an incumbent in October of every even-numbered year.

For the foregoing reasons, then, we conclude the instant petition was untimely filed whether or not Sec. 111.83(5), Stats., is deemed applicable to the instant circumstances.

Accordingly, we have granted WFT's motion and dismissed WEAC's petition as untimely. WEAC can, of course, timely file a petition to represent this unit in October of this year.

Dated at Madison, Wisconsin, this 8th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

6/ Under 111.92(3), the nominal expiration of an agreement must coincide with the end of the fiscal year or biennium. In on-going SELRA relationships, nominal agreement expirations have in practice coincided with the end of the biennium, (tr. 33-42) perhaps as a mandated consequence of Sec. 111.92(4).