STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	:	Case 98 No. 37307 MP-1870 Decision No. 23904-A

Appearances:

Schwartz, Weber, Tofte & Nielsen, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin, 53403, appearing on behalf of Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, Suite 600, 119 Martin Luther King, Jr. Blvd., P. O. Box 1664, Madison, Wisconsin, 53701, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine Education Association filed a complaint on July 21, 1986 and an amended complaint on September 26, 1986 with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had violated Sec. 111.70(3)(a)(4), Wis. Stats., by unilaterally implementing a new salary schedule. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(5), Wis. Stats. A hearing was held in Racine, Wisconsin, on September 29, 1986, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs, and the record was closed on December 8, 1986. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Racine Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 701 Grand Avenue, Racine, Wisconsin 53403. James J. Ennis is Executive Director of Racine Education Association and is its agent.

2. Racine Unified School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal office at 2220 Northwestern Avenue, Racine, Wisconsin 53404. Frank L. Johnson is Director of Labor Relations of the Racine Unified School District and is its agent.

3. At all times material to this proceeding, Complainant has been the certified exclusive bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by Respondent, excluding on-call substitute teachers, interns, supervisors, administrators, and directors.

4. The most recent collective bargaining agreement between Complainant and Respondent expired on August 25, 1985. Since December, 1984, the parties have been engaged in bargaining for a successor agreement; on January 26, 1987, the Commission issued its Findings of Fact, Conclusions of Law and Order Requiring Mediation-Arbitration in that dispute. During the pendency of the parties' mediation-arbitration proceeding, the parties also engaged in a lengthy declaratory ruling process involving proposals challenged by both parties as alleged permissive subjects of bargaining, throughout 1986. During the course of the declaratory ruling process the Commission's Investigator suspended the exchange of modified tentative final offers, but the parties continued to make modified offers to each other.

5. During the course of modification of offers, about January 23, 1986 the parties' offers became the same with respect to salary schedules for 1985-86 and 1986-87.

6. On February 18, 1986 Complainant's Attorney Weber wrote to Respondent's Director of Labor Relations Johnson as follows:

> Jim Ennis has requested that I inquire as to the District's intentions with regard to implementation of the tentative agreements and salaries. I am therefore requesting that you send me a written response at your earliest convenience.

On February 19, Johnson replied to Weber that the District had not yet taken any position regarding implementation, and asked whether the Association had any preference. Ennis, in his testimony, admitted receipt of this letter. The record does not demonstrate that any reply was made by Complainant. On April 9, Johnson wrote to Ennis as follows:

> As you know, both the School District and the REA have submitted final offers which among other things have set out the 1985-86 salary for teachers. As you also know, we are many months, possibly a year or so, before an Arbitrator will determine the new contract.
>
> The District's final offer and the REA's final offer in regard to salary is identical. Such will amount to a significant raise for the teachers and, of course, is retroactive to the start of this school year.
>
> Under the Brookfield decision of the Wisconsin Employment Relations Commission, the School District would probably be found to have committed a prohibited practice if it unilaterally implemented the new salary schedule prior to all hearings and mediation/arbitration sessions required by Sec. 111.70(4)(cm).
>
> This, of course, could be avoided if the REA agreed to such implementation.
>
> Please let me know what the Association would like in this regard before April 21, 1986 so I can discuss such matter with the Board's Negotiating Committee.

7. On May 12, 1986 Ennis and Johnson met to discuss the question of implementation and certain other unrelated matters. At that meeting Ennis proposed that the District implement not only 1985-86 salaries, but also 1986-87 salaries when appropriate, full retirement contributions consistent with the Association's position in the final-offer process, and interest on withheld salary monies. Johnson refused to implement anything beyond the 1985-86 salary schedule.

8. On June 12, 1986, the Association presented the District with a new proposal concerning implementation, which dropped the demand for interest, proposed that the District modify its final offer to provide for payment of full retirement contributions as of August 15, 1986, and proposed that both 1985-86 and 1986-87 salary schedules be implemented promptly. In its cover letter attached to the proposal, Complainant stated "We believe there is the distinct possibility of State aid loss if teachers are not paid their 1985-86 salary on or before June 30, 1986." On the following day, Johnson replied to Ennis acknowledging receipt of this proposal, and stated that on June 16 the Board would consider implementing teacher salaries. Johnson stated that the implementation to be considered would cover 1985-86 scheduled salaries, 1985-86 extra-duty compensation, and an increase in the teachers' retirement contribution from 4.5 percent to 5.5 percent. All of these conditions of employment were consistent with Respondent's most recent offer to the Association. On or about June 30, 1986, the District did implement the proposals contained in Johnson's letter of June 13, and proceeded to pay employes covered by the collective bargaining agreement retroactively at the 1985-86 rates. Respondent continued to pay the 1985-86 rates through the date of the hearing herein.

9. The record shows that the Association originally raised the subject of implementation of the agreed-upon salary schedules, and that it maintained an interest in implementation of said salary schedules throughout the period prior to the actual implementation. The record also shows, however, that at no time did the Association agree to the combination of proposals which the District proposed to implement, nor did the Association agree to partial implementation up to the level of the District's final offer. The record accordingly fails to show clear and unmistakable evidence that the Association waived its right to bargain concerning the implementation of the salary proposals.

10. The record shows that approximately 1.5 million dollars of the total State aid of 41.5 million dollars received by the District as aid from the State of Wisconsin was owing as a result of salary increases budgeted for and included in both parties' final offers for 1985-86, but would not be paid to the District in 1985-86 unless the District first expended the salary monies to the teachers. The record shows that if these salary monies were not expended by June 30, 1986, or a final offer committing the District to that expenditure certified for mediation-arbitration by October 31, 1986, the District would not receive that increment of aid in 1986 and might be compelled to raise taxes by the amount necessary to pay the retroactive salary adjustments when due. But the record also shows that the District would receive the same money in the following year if the final-offer process, or implementation of the salary schedule, did not take place prior to the dates noted above, and that the District could then correspondingly reduce taxes to account for the offsetting aid increase. The record therefore fails to show that there was any necessity for the District to implement salary increases unilaterally on or about June 30, 1986.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

By unilaterally implementing changes in teachers' salaries and retirement contributions, Respondent violated Sec. 111.70(3)(a)1 and 4, Wis., Stats.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

It is ordered that the Racine Unified School District, its officers and agents shall immediately:

1. Cease and desist from unilaterally implementing changes in mandatory subjects of bargaining in violation of its duty to bargain as provided in the Municipal Employment Relations Act.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

A. Bargain collectively with Racine Education Association regarding salaries, extra-duty compensation and retirement contributions.

B. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of service of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 20th day of February, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ Footnote 1 on page 4.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In this somewhat unusual case, the Union complains that it received the pay increase it demanded.

The complaint as filed alleged that the District violated Sec. 111.70(3)(a)4 by unilaterally implementing portions of its final offer prior to an interest arbitration award. On September 26, 1986, Complainant amended the complaint to add an allegation that the District met once with Complainant with no intention of negotiating in good faith prior to implementing its proposed salary schedule. The answer alleges that the parties were at impasse concerning the question of implementation, that the Complainant had waived any right to bargain further concerning the matter by its conduct during negotiations, and that the threatened loss of state aids, and possible demand for interest payments by Complainant, created a necessity to implement the 1985-86 salaries by June 30, 1986. The essential facts are stated in the Findings and need not be repeated here.

THE PARTIES' POSITIONS

Complainant contends that the District has clearly unilaterally changed conditions of employment, and that under the rule of City of Brookfield 2/ unilateral implementation of a proposal or proposals is prohibited unless waiver or necessity is established. Complainant argues that the testimony at hearing showed that the District would receive its school aids if the Commission were to certify an impasse prior to October 31, 1986, and that the choice of June 30, 1986 for implementation was therefore speculative. Complainant argues further that even if the District lost revenue in the current year, it would be able to recoup that money in the following year when the salary increase was paid, and that therefore there would be no net loss. Complainant contends that its participation in a negotiation meeting at which it argued for implementation under certain circumstances does not constitute a waiver, because the combination of proposals it argued for implementing was different from that which the District implemented. Complainant contends that the District entered into that meeting with the fixed and firm intent of implementing its proposal and that it therefore bargained in bad faith.

Complainant alleges that it was harmed by the District's action because the self-help of the District's implementation foreclosed the Association from attempting to bring pressure to bear on Employer officials with a view to receiving interest on the money withheld during the 1985-86 school year. Complainant points to testimony that an interest payment was received from the District by teachers during the prior contract in recognition of delayed payment, as showing that its bargaining position was realistic and that Respondent consequently created a real and negative impact on Complainant's ability to bargain by its unilateral action. Complainant contends that it acted in good faith throughout, and that the matter here is on all fours with Brookfield. Complainant proposes as a remedy an award of interest for that time between January, 1986 when the final offers of the parties became identical, and June 30, 1986 when the District implemented part of its offer.

Respondent contends that in order for there to be a duty to bargain, there must be something to bargain about, and that in the present case there was already an agreement. Respondent points to the evidence that the proposed salary schedules offered by both parties were identical in both amounts and effective date, and had been identical since January, 1986. Respondent contends further that Complainant waived any right it had to bargain by its conduct, essentially arguing that Complainant led Respondent into considering early implementation of the salary schedule and then backed off, raising new issues, when it appeared that

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2/ Decision No. 19822-C, WERC, 11/84.

its request might be granted. Respondent further contends that the timing of Complainant's last request for a meeting would have pushed the District, had it complied, past the last date for salvaging the State aids, and that it was part of a pattern of dilatory conduct by Complainant.

Respondent also contends that under Taft Broadcasting Company 3/ it has the right to implement any proposal unilaterally once good faith negotiations have resulted in an impasse. Respondent argues that an impasse existed here because the Association had filed a petition for mediation-arbitration and that petition stated that the parties had "reached a deadlock." Respondent points to the statutory requirement that the parties be deadlocked prior to filing for mediation-arbitration, and also to the Complainant's statement in the original complaint (later amended out) that the parties were at impasse at the time, as evidence that impasse had in fact been reached. Respondent also argues that because of the Examiner's limitation on evidence presented concerning the number of bargaining meetings on the overall issues, it would be improper to decide this matter adverse to Respondent based on the lack of impasse. Respondent notes that the proposals implemented were consistent with its final offer, and contends that their implementation in the presence of impasse does not constitute refusal to bargain.

Recognizing that this matter as before the Examiner involves the application of principles expounded by the Commission in Brookfield, 4/ Respondent preserves its arguments that Brookfield was a wrong decision; these arguments, though recapitulated at some length, will not be discussed here. Respondent, however, also defends its conduct in terms of the two exceptions permitted by Brookfield, namely waiver by the other party and necessity of implementation. For its necessity defense, Respondent argues that had the salary schedule not been implemented prior to June 30, 1986, the resulting loss of $1.5 million in state aid would have required a 13 percent tax increase to maintain the projected budget. Respondent contends that while Ennis testified that he knew before the end of June that the District would not lose the state aid, he made no attempt to communicate this to the District at that time. Respondent alleges that losing that funding would affect the ordinary and predictable evolution of the Employer's function. Respondent argues further that based on past experience, it had every reason to believe that the October 31 alternative deadline for certification of final offers would not be met, and that for these reasons there was a necessity to implement the salary proposal on the only date when it could be sure it would still recoup the state aids.

Respondent further argues that even if Brookfield is considered a correct decision, its rationale would not apply to this case, because what Brookfield prohibits is self-help concerning matters which are in dispute in interest arbitration. Here, Respondent argues, the proposals implemented were not in fact in dispute, because they were contained in both parties' final offers. Respondent notes that in Brookfield employes were deprived by the employer's action of one of their former benefits; but that here employes would suffer no loss, and in fact received an increase in pay.

DISCUSSION

Under the best of circumstances, the nature of impasse and the parties' rights under it constitute an elusive subject; in the peculiar circumstances of the present case, the subject assumes something of a "through the looking glass" quality. It is necessary, therefore, to distinguish the principles involved, and the reasons behind those principles, from the logic or illogic of the parties' conduct here.

In NLRB vs. Katz 5/ the U.S. Supreme Court affirmed the Board's departure from the usual "totality of conduct" standard for determining whether or not bad faith bargaining had occurred, for purposes of determining the legality of unilateral actions. The Court upheld the Board's finding that unilateral action

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3/ 163 NLRB 475, 64 LRRM 1386 (1967), enforced 395 Fed. 2nd 622, 65 LRRM 2272 (D.C. Cir. 1968).

4/ Supra.

5/ 369 U.S. 736, 50 LRRM 2177 (1962).

was a per se violation of the duty to bargain, essentially because it undercut the bargaining obligation in the same way as a complete refusal to discuss collective bargaining issues. The Court allowed the possibility of certain exceptions to the duty to refrain from unilateral action; the only exception relevant to this matter is that governing the parties' rights in the event that an impasse is reached following good-faith bargaining. The private-sector rule governing impasse conduct which subsequently developed is that an employer may make unilateral changes in working conditions at that point, provided that such changes are not substantially different or greater than any offers which the employer proposed during the negotiations. 6/ Respondent essentially argues for this view of the law.

In City of Brookfield 7/, however, the Commission concluded that private-sector concepts of impasse and its resolution did not apply to disputes subject to resolution under interest arbitration. The Commission there stated:

> For the following reasons, we share the Examiner's conclusion that the compulsory final and binding interest arbitration provisions of Sec. 111.70(4)(cm) make inappropriate an application of the private sector impasse defense principles to disputes subject to mediation-arbitration. Instead, we interpret MERA to mean that where, as here, there is a statutory means for obtaining a final and binding resolution of a contract negotiation dispute, a self-help unilateral change in a mandatory subject, absent waiver or necessity, constitutes a per se refusal to bargain violative of the MERA duty to bargain. 6/ In other words, in negotiations subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., impasse, however defined, is not a valid defense to a unilateral change in a mandatory subject of bargaining. 7/

6/ As noted in the text following Note 10, infra, a possible exception to this general rule might be made in an extreme case of unlawful abusive delay of the statutory dispute resolution process. For a discussion of the waiver defense see, e.g., City of Brookfield, Dec. No. 11406-A, -B, (WERC, 9/73) aff'd, (CirCt Waukesha, 6/74) The Examiner aptly discussed the necessity defense at Note 28 of her decision. The possible availability of such a defense under MERA was noted in Racine Schools, Dec. Nos. 13696-C and 13876-B (Fleischli with final authority for WERC, 4/78) at 56. In the private sector, see, e.g., Standard Candy Co., 147 NLRB 1070 (1964) (change justified as good faith response to need to conform with minimum wage provisions of the Fair Labor Standards Act); and AAA Motor Lines, 215 NLRB 793, 88 LRRM 1253 (1974) (change justified by union's dilatory and unlawful bargaining tactics combined with need to change in order to avoid employe losses of certain fringe benefits after contract expiration).

7/ (Footnote omitted.)

In our opinion, the foregoing interpretation of the MERA duty to bargain is consistent with both the language of MERA, including Sec. 111.70(4)(cm), and with the underlying purposes of that legislation.

6/ Atlas Tack Corporation, 226 NLRB 222, 93 LRRM 1236 (1976), enforced 559 Fed. 2nd 1201, 96 LRRM 2660 (CA1, 1977).

7/ Supra.

We are cognizant that, as the Examiner also noted, the separate (conventional) interest arbitration procedure for Milwaukee Police personnel in Sec. 111.70(4)(jm) contains an express provision prohibiting unilateral changes in any mandatory subject of bargaining once either party has filed a petition to initiate the final and binding interest arbitration process. 8/ In our view, however, the silence on that subject in Sec. 111.70(4)(cm) neither requires nor warrants the conclusion that the Legislature made any specific judgment as to the availability of an impasse defense in disputes subject to (4)(cm) mediation-arbitration.

The Legislature surely cannot, for example, be deemed by its silence to have intended that disputes subject to mediation-arbitration under Sec. 11.70(4)(cm) be subject to a rule that is just the opposite of that expressly contained in the Milwaukee Police procedure. For that would mean that either party is free at any time after the petition for mediation-arbitration is filed to make any unilateral changes it chooses, whether previously proposed or not, and regardless of the status of the bargaining. Such would obviously be inconsistent with the duty to bargain in good faith and with the underlying purposes of MERA.

It could be argued that the Legislature's silence on the subject represents its intention that the pre-existing case law on the subject continue in effect. As the Examiner noted however, 9/ the Commission case law under MERA prior to the enactment of Sec. 111.70(4)(cm) was not developed to such a point as would clearly define when the duty to bargain was exhausted or when an "impasse" had been reached such as would entitle a party to implement a proposal it had previously offered in bargaining.

We conclude that the Legislature, by its silence in Sec. 111.70(4)(cm) as compared with the Milwaukee Police language concerning unilateral changes, was leaving the question of whether there is an impasse defense available in disputes subject to mediation-arbitration for interpretation by the Commission and the Courts in the subsequent administration and intepretation of the mediation-arbitration provisions consistent with the underlying purposes of the legislation. We proceed below with an analysis of what interpretation best serves the underlying purposes of the statutory provisions involved.

8/ Section 111.70(4)(jm)13, Stats., reads as follows:

> Subsequent to the filing of a petition before the commission pursuant to subd. 1 and prior to the execution of an agreement pursuant to subd. 9, neither party may unilaterally alter any term of the wages, hours and working conditions of the members of the police department.

9/ (Footnote omitted.)

The Legislature has included in Sec. 111.70(6) of MERA an express DECLARATION OF POLICY as follows:

> The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the

> municipal employer through a labor organization of other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

We agree with the Examiner that an application of private sector impasse defense principles to disputes subject to mediation-arbitration would provide an incentive for parties to render nonspeedy and ineffective the statutory processes for peaceful resolution of the disputes subject to mediation-arbitration that the parties are unable to resolve voluntarily through collective bargaining. For example, in the absence of a collective bargaining agreement in force, a party could propose any change in the status quo that is unacceptable to the other side, maneuver to an impasse in the private sector sense, implement the proposed change, and simultaneously prevent the immediate referral of the dispute to a mediator-arbitrator by filing a petition for declaratory ruling on the mandatory/non-mandatory status of certain of the other party's proposals or otherwise delaying the issuance of a mediation-arbitration award. That is not a scenario consistent with or promotive of peaceful resolution of disputes.

It could be argued that the further into the bargaining and mediation-arbitration process a party must go before it may lawfully implement a previously proposed change in the status quo, the greater the incentives for the party favored by the status quo to (1) avoid or delay reaching that point in the statutory process at which the other party is permitted to implement its proposed change in the status quo; and (2) avoid or delay reaching a voluntary settlement on other, less favorable terms. We note in that regard, however, that the Sec. 111.70(4)(cm) legislative scheme incorporates arrangements designed to reduce that potential for delay (halting it only for timley declaratory ruling petitions but not, e.g., for prohibited practice complaints). 10/ Moreover, in our view, creative retroactivity proposals can be proposed which--if agreed upon or included in the final offer selected by the arbitrator--would eliminate much of the advantage of such delaying tactics. In an extreme case, unlawful abusive delay of the statutory process (not present here) might be sufficient to render lawful a unilateral change previously proposed. We recognize that in many instances where both parties are acting in exemplary good faith the statutory processes continue well beyond expiration of any predecessor agreement and that some changes will be difficult to implement retroactively. Nevertheless, we are persuaded that the underlying purposes of MERA and Sec. 111.70(4)(cm) are better served if the parties focus on achieving solutions to retroactivity problems and the rest of their bargaining objectives through bargaining and the statutory procedures rather than through unilateral action.

Thus, although the mediation-arbitration provisions specifically provide for a formal Commission determination that an impasse exists, we find it more consistent with the language of Sec. 111.70(4)(cm) 11/ as well as with the underlying purposes of MERA to conclude that there is no available impasse-based defense to a unilateral change in a mandatory subject in disputes that are subject to final and binding Sec. 111.70(4)(cm) interest arbitration. 12/ That conclusion, in our view, will encourage the parties to utilize the fair and peaceful statutory procedure to achieve proposed changes in the status quo regarding mandatory subjects rather than resort to self-help unilateral action to that end. Making changes in the mandatory subject status quo achievable for the most part 13/ only through the procedures

provided by law will encourage voluntary agreements and will promote the speed with which such disputes are processed in Sec. 111.70(4)(cm) mediation-arbitration, rather than focusing the attention of the parties on potentially less peaceful self-help methods (e.g., unilateral changes) of pursuing their bargaining objectives. This holding does not, of course, affect the municipal employer's rights to implement changes in permissive subjects of bargaining. 14/

10/ Section 111.70(4)(cm)6.e., reads as follows:

> Mediation-arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.

11/ As the Examiner noted, Sec. 111.70(4)(cm)6.b. expressly contemplates continued attempts at voluntary resolution, short of a final and binding arbitration award, even after "impasse" has been certified by the Commission.

Section 111.70(4)(cm)6.b. reads, in part, as follows:

> The final offers of the parties, as transmitted by the commission to the mediator-arbitrator, shall serve as the initial basis for mediation and continued negotiations between the parties with respect to the issues in dispute. During such time, the mediator-arbitrator, and upon his or her request the commission or its designee, shall endeavor to mediate the dispute and encourage a voluntary settlement by the parties.

12/ See Note 7, supra.

13/ See Note 6, supra.

14/ See, e.g., City of Madison (Police), Dec. No. 17300-C (WERC, 10/83).

The Commission noted, however, that defenses based upon waiver or necessity of implementation were available to an employer. Both of these defenses have been argued here; while Respondent has argued vehemently that Brookfield should be overturned, it is plain that Respondent recognizes that such is not the province of an examiner. I will turn therefore to a discussion of Respondent's Brookfield defenses.

Waiver

The Commission has stated that a waiver of a statutory right to bargain must be established by "clear and unmistakable" contract language or bargaining history. 8/ Here, the Association plainly exhibited an interest in early implementation of the agreed-on salary and related proposals, and made offers to that effect. But there was never a moment at which the parties were in agreement. There was no point at which the Association indicated any willingness to forego further bargaining on the issue; and Respondent has shown nothing to indicate that it relied on any conduct of the Association to its detriment in concluding that it would implement the salary offer. Respondent contends that the Association was dilatory in its handling of the matter, but it is plain that Respondent was aware that the Association would agree to implementation only if the 1986-87 schedule and other terms of employment were also implemented, more than two weeks prior to the date it implemented its proposal. The fact that a

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8/ City of Wauwatosa, Dec. Nos. 19310-C, 19311-C, 19312-C, WERC, 4/84.

discussion of the subject had been going on by that time for four or five months does not appear remarkable in view of the pace of the parties' negotiations in other respects, evidenced in the record. There is therefore little support for the District's contention that the Association waived its right to bargain by its conduct. Such evidence of dilatory and inconsistent behavior as exists here falls far short of a clear and unmistakable showing of waiver; I therefore reject Respondent's waiver theory.

Necessity

I also find Respondent's theory of necessity unpersuasive here. Respondent essentially alleges that the loss of one and a half million dollars in state aids constitutes necessity justifying unilateral action. This is an attractive argument so long as the sizable dollar figure is considered alone; consideration of the circumstances and evidence surrounding that figure reduces its impact considerably.

First, that $1.5 million exists as part of a total state aid allotment of some $41.5 million earmarked for the District. The loss of $1.5 million would constitute approximately 4 percent of that total. But the state aids do not constitute all or even the majority of the District's budget. The record shows that state aid would constitute slightly less than half of the 1985-86 budget, and a lesser proportion of the 1986-87 budget, the remainder being from local tax levies and other sources. 9/ The loss of $1.5 million out of a total 1985-86 budget of $84,448,957 constitutes about 1.8 per cent.

Even the prospect of outright loss of some 2 per cent of a budget would be doubtful as a "necessity" justifying what would otherwise be a violation of an employer's duty to bargain. Given that numerous exigencies can arise in the complexities of public policy which may threaten to cost two per cent or more of the budget, a finding that this magnitude of loss automatically justified unilateral action could open the door to widespread abuses. But it is not necessary to determine whether a necessity existed here on that basis, because the record clearly shows that the District would not, in any permanent sense, lose the money at issue here by not implementing salary increases unilaterally.

Assistant Superintendent Edwin Benter testified that without implementing salary increases by June 30, the District would lose the incremental state aids triggered by those increases, unless a Department of Public Instruction provision, allowing for late payment in the event of final offers being certified for mediation-arbitration by October 31, was timely triggered. But on cross-examination, Benter also testified that if the District did not implement the salary increases and did not receive the state aids prior to receipt of an arbitrator's decision, the District could still receive the same state aids in the following year, based on the payment at that time of the retroactive salary increases. Based on Benter's testimony, I can find no greater impact to the District from refraining from implementation than the possible necessity to impose a temporary tax increase until the money was recouped from the State following receipt of the arbitration award; and Benter testified that in the event of such an increase, there would be an offsetting decrease after receipt of the eventual state aids. Under these circumstances, even the outright loss of 2 per cent postulated by the District does not exist. The most that can be said is that a temporary tax increase might be passed in order to finance the retroactive salary payments until the state aids were recouped. And the District had no pressing need for those funds until it committed them by paying the increases. In effect, therefore, the District created the "necessity" for prompt receipt of the state aids, by paying out the salary increases before it was required to do so by an arbitration award.

Inapplicability of Brookfield; Remedy

As Respondent notes in its brief, its argument that Brookfield is inapplicable here is interrelated with the question of what the remedy might be in

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9/ Respondent's Exhibit 11.

the event of a finding of violation. Respondent contends that the fact that there was no dispute over the size of the salary increase or its effective date means that Brookfield is inapplicable. In Respondent's view, the fact that the employes were slated to receive the same increase anyway meant that it could not be prohibited from implementing that raise any time it chose.

There is an undeniable attraction to the District's argument. On the face of the matter, employes had nothing to lose and something to gain by the District's conduct, so what was wrong with implementing the proposal?

Debating the wisdom or unwisdom of the Association's refusal is not the province of this Examiner. The fact is that it did refuse; and to determine the merits of Respondent's contention it is necessary to return to the leading case in this area, because there is therein a discussion of a related problem which casts some light on the possible motivations of parties in this situation.

> The unilateral actions of the respondent illustrate the policy and practical considerations which support our conclusion.
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> (SICK LEAVE)
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> We consider first the matter of sick leave. A sick-leave plan had been in effect since May 1956, under which employees were allowed ten paid sick-leave days annually and could accumulate half the unused days, or up to five days each year. Changes in the plan were sought and proposals and counter-proposals had come up at three bargaining conferences. In March 1957, the company, without first notifying or consulting the union, announced changes in the plan, which reduced from ten to five the number of paid sick-leave days per year, but allowed accumulation of twice the unused days, thus increasing to ten the number of days which might be carried over. This action plainly frustrated the statutory objective of establishing working conditions through bargaining. Some employees might view the change to be a diminution of benefits. Others, more interested in accumulating sick-leave days, might regard the change as an improvement. If one view or the other clearly prevailed among the employees, the unilateral action might well mean that the employer had either uselessly dissipated trading material or aggravated the sick-leave issue. On the other hand, if the employees were more evenly divided on the merits of the company's changes, the union negotiators, beset by conflicting factions, might be led to adopt a protective vagueness on the issue of sick leave, which also would inhibit the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively. 10/

It is apparent from this discussion that even where an employer's proposal may benefit employes, its implementation in the absence of a total settlement or agreement between the parties can have the effect of splitting the bargaining unit or diminishing employes' zeal to conclude an agreement, for the reasons discussed by the Court. But this is true even if the proposal in question is one on which the parties are agreed: Items removed from contention are still related to other proposals which the parties continue to disagree on, and it is apparent that allowing one party unilaterally to remove an item from discussion by implementing it can have the same divisive effects discussed by the Court. For that reason, all of the terms of employment are bargainable, not merely those which appear in the contract; and it is obvious that the actual date of payment of a wage increase is a mandatory subject of bargaining, just as is the amount and the effective date.

10/ Katz, supra, at 50 LRRM 2181.

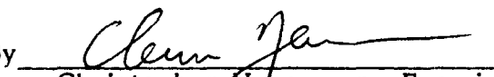
This does not mean that Respondent's contention concerning lack of harm suffered by the employes is not entitled to consideration. In fact, the absence of harm to the employes is entitled to considerable weight; but the principles underlying the law would be ill-served if that weight were applied to the question of violation rather than, as is proper, the question of what remedy is appropriate.

Complainant has shown, in sum and substance, that Respondent unilaterally changed wages and other terms of employment without waiver or necessity, and in violation of its duty to bargain. Respondent, however, has shown that no employes suffered as a result of its action. Furthermore, the record does not sustain Complainant's claim for a payment of interest. While Complainant's demand for interest was understandable, and was consistent with prior practice of the parties on at least one occasion, it was not, in fact, part of Complainant's final offer. Complainant therefore finds itself arguing here for payment of an increment of money which it would not have received had the final offers simply proceeded as they were to arbitration and the salary increase been paid in due course. Moreover, Complainant's request is flatly contrary to the sequence of action, because it would result in interest being paid for precisely that period when the District was admittedly not in violation of the statute, terminating on the date that it began to violate the statute.

I read the Complainant's difficulty in formulating a substantial remedy in this case as evidence of the problem it has in showing that any actual harm was suffered by the employes it represents or, indeed, by the Association itself. Complainant argues for this "admittedly unique" remedy on the basis that it is allegedly "equitable and would serve the purpose announced in Brookfied of preventing similar violations in the future." An argument for equity in a remedy is essentially an argument that the punishment must fit the crime. Here, for reasons already expressed, I find that the Complainant's proposed punishment substantially exceeds the District's "crime," and that an order to cease and desist meets the requirements adequately.

Dated at Madison, Wisconsin this 20th day of February, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner