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-B

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 and 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, 53701-1664, appearing on behalf of Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AND CONCLUSION OF LAW AND MODIFYING EXAMINER'S ORDER

Examiner Christopher Honeyman having, on February 20, 1987, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he concluded that the Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally implementing changes in the status quo with respect to wages and retirement contributions during the hiatus period between agreements; and the Respondent having, on March 10, 1987, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and in accordance with the briefing schedule, the Respondent having filed its brief on April 7, 1987, and the Complainant having filed a responsive brief on May 1, 1987 and the Respondent having notified the Commission on June 1, 1987 that it would not file a reply brief; and the Commission having reviewed the record in the matter including the Examiner's decision, the petition for review and the briefs filed in support and in opposition thereof, and being satisfied that the Examiner's Findings of Fact and Conclusion of Law should be affirmed, and his Order should be modified;

NOW, THEREFORE it is

ORDERED 1/

A. That the Examiner's Findings of Fact and Conclusion of Law be, and hereby are, affirmed.

B. That the Examiner's Order is hereby modified to read:

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in

(Footnote 1 Continued on Page 2)

ORDER

IT IS ORDERED that the Racine Unified School District, its officers and agents shall immediately:

1. Cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by unilaterally implementing change in teachers' salaries, extra-duty compensation and retirement contributions.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

(Footnote 1 Continued)

s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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 AFFIRMING EXAMINER'S FINDINGS OF FACT, AND CONCLUSION OF LAW AND MODIFYING EXAMINER'S ORDER

BACKGROUND

In its complaint initiating these proceedings, the Complainant alleged that the Respondent committed prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., by unilaterally implementing a portion of its final offer on salary by implementing the 1985-86 salary schedule without any mutual agreement between the parties. The Respondent admitted that as of about June 30, 1986, it retroactively implemented salary increases for the 1985-86 school year but denied that it committed any prohibited practices and alleged that it could unilaterally implement the salary increase because the parties were at impasse, or alternatively, the threatened loss of state aids and the threat that interest would have to be paid provided justification for such implementation.

The Examiner's Decision

The Examiner rejected the Respondent's arguments related to unilateral implementation after impasse had been reached noting that the Commission's conclusion that where there is a statutory means to obtain a final and binding resolution of a contract bargaining dispute, a unilateral implementation of a mandatory subject constitutes a per se refusal to bargain in good faith except where waiver or necessity can be shown. The Examiner considered the Respondent's assertion of waiver but concluded that the evidence failed to show a clear and unmistakeable waiver. The Examiner also found the Respondent's theory of necessity unpersuasive. The Respondent had asserted that the loss of state aids justified its unilateral implementation; however, the Examiner found that Respondent would not lose its aids because the aids would be granted the year following the expenditure, so if the expenditure was made at a later date, the aids would be made the following year and no permanent loss would occur, and thus there was no "necessity" for Respondent's unilateral action. The Examiner found that the Respondent's unilateral implementation of the 1985-86 salary schedule in the absence of waiver or necessity violated its duty to bargaining under MERA, and ordered the Respondent to cease and desist its unilateral implementation of a mandatory subject of bargaining.

The Petition for Review

The Respondent in its petition for review contends that the Examiner erroneously held that Respondent could not lawfully implement its wage proposal without a showing of necessity. It further asserts that the Examiner's Finding of Fact 10 that Respondent failed to show necessity is clearly erroneous as is the legal conclusion that follows said finding.

Respondent's Position

The Respondent contends that it implemented the agreed upon wage increase based on necessity. It cites prior Commission decisions 2/ which it asserts recognize necessity as a defense for unilateral action where; 1) the public employer must get on with its business promptly and the change involves the ordinary and predictable evolution of the employes' function and does not involve a major change in the use of employes; and 2) where a change occurs so that pressures to make an immediate change arise. Here, it submits that it was necessary to implement the salary schedule to avoid the loss of substantial state aid. It claims the Respondent would lose about $1.5 million in state aid in the 1986-87 school year and a 13 percent tax increase would be required to maintain its projected budget. It asserts that this loss would have adversely affected the Respondent. It maintains that implementation would not harm either side. It contends that the Examiner's rationale that the $1.5 million was not significant compared to the Respondent's total budget is erroneously based on the dubious assumption that the Respondent could raise and lower taxes to cover the ebb and

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2/ City of Eau Claire, Dec. No. 22795-A (Honeyman, 1/86); County of Dane, Dec. No. 22681-A (Honeyman, 11/85).

flow of its income. It points out that interest of 10% on the $1.5 million would produce $150,000.00, which would be a permanent loss. It argues that the Examiner's assumptions were erroneous and necessity has been demonstrated, otherwise the status quo requirement would unduly interfere with a school district's governance.

The Respondent argues that only self-help on matters in dispute in interest arbitration is prohibited, and inasmuch as the salary increase here was resolved, the implementation harmed no one. It notes that the Examiner recognized this argument in fashioning his remedy but rejected the argument on its merits. It submits that the implementation of the wage increase did not affect either party's ability to go to arbitration.

The Respondent alleges that the Examiner's finding that there was no waiver by Complainant is also erroneous. It asserts that the Union waived its right to bargain implementation by its pattern of conduct. It insists that Complainant was dilatory and sought to extract concessions outside of mediation/arbitration. It maintains that the totality of Complainant's conduct establishes waiver.

The Respondent further alleges that because the parties had agreed on the wage increase and its effective date, there was nothing to bargain about so it had no duty to bargain.

Finally, the Respondent posits that Brookfield 3/ was wrongly decided and should be reversed. It submits that the inability to implement a proposal after good faith bargaining leads to union abuse. It asserts that the inability to implement a proposal subjects an employer to delaying tactics and impedes the speedy resolution of disputes. It argues that Brookfield is wrong because the Commission concluded that the interest arbitration statute amended the duty to bargain, yet the interest arbitration law did not change the definition of the duty to bargain or school law statutes giving school boards the authority to create, eliminate and change terms of employment. It notes that the duty to bargain does not require a party to reach an agreement. It claims that the Commission erred in determining that private sector impasse defense principles were inapplicable to mediation-arbitration disputes because the impasse defense arises out of the duty to bargain and impasse does not create authority to implement, rather it removes a limitation imposed by the duty to bargain. It asserts that the interest arbitration law did not create a new limitation on change made by school boards. The Respondent alleges that interest arbitration was a substitute for the right to strike and did not substitute any "remedy" for the employer. It maintains that Brookfield construes the duty to bargain as a "remedy" for the employer and also limits the employer to that "remedy." It submits that Brookfield eliminated the employer's authority and responsibility under school law and did not provide any substitute authority.

It further contends that the Commission misconstrued the statutes. It points out that the Sec. 111.70(4)(jm), Stats., prohibits unilateral changes, whereas Sec. 111.70(4)(cm) is silent on unilateral changes. It asserts that the legislature must be presumed to know what it did and the appropriate interpretation is that the two statutes do not mean the same thing. It claims that the Respondent's right to make changes after satisfying its duty to bargain was well established before the passage of the interest arbitration statute; that any further limitation should be found in the interest arbitration statute and that none is found in Sec. 111.70(4)(cm), Stats. Citing State v. Welkos, 4/ it submits that the proper construction of Sec. 111.70(4)(cm), Stats., is that it is different than Sec. 111.70(4)(jm), Stats. The Respondent contends that the Commission was concerned that employers may abuse any "self-help" rights while ignoring the fact that a retroactive mediation-arbitration award provided the union a remedy but a retroactive award does not provide the employer a remedy. It requests that the Examiner's decision, insofar as it found a violation and ordered relief, be reversed and the complaint be dismissed.

3/ Dec. No. 19822-B (WERC, 10/84).

4/ 14 Wis.2d 186 (1961).

Complainant's Position

The Complainant contends that the evidence fails to establish necessity as a defense for Respondent's unilateral implementation of the wage schedule on June 30, 1986. It submits that there would be no loss of state aid if funds were expended by June 30, 1986 or if the final offers were certified by October 31, 1986, and there was no reason to believe that the final offers would not have been certified by October 31, 1986. It claims that the District's ability to plan and budget was not affected in any way by the delay in implementation because its temporary loss could be recouped the following year when the Respondent had authority to implement the raises. Complainant asserts that the potential loss of interest asserted by the Respondent is hypocritical as it was the individual teacher's interest that the District was in jeopardy of losing.

The Complainant maintains that Brookfield applies to the instant case as admitted in the April 9, 1986 letter by the Respondent's Director of Labor Relations. It submits that this letter evidences bad faith on Respondent's part and Respondent should be estopped from raising this defense. It further contends that the Respondent's self-help implementation was in violation of Brookfield as either or both parties could have changed its salary proposal, and thus, implementation would have made it theoretically difficult for Complainant to change its proposal downward. Complainant insists that the key to Brookfield is the maintenance of the balance of power between the parties and the piecemeal implementation by Respondent disturbs this balance as it allows Respondent to dictate the timing of benefit increases to the Respondent's benefit.

The Complainant contends that there was no waiver of its right to bargain as the evidence on the chronology of events amply supports the Examiner's conclusion that there was no waiver. It submits that Respondent had a duty to bargain under Brookfield as any self-help unilateral change is a per se refusal to bargain. It posits that Brookfield need not be relitigated as the Commission has considered these arguments before and rejected them. It insists that the Examiner's decision be affirmed in all respects.

DISCUSSION

We affirm the Examiner's decision that the District acted unlawfully when, in the absence of a bona fide business necessity and in the absence of a clear waiver by the Association, it unilaterally implemented part of its final offer.

The Respondent insists that Brookfield was wrongly decided and urges the Commission to overrule it. We reach our decision, however, irrespective of the Brookfield decision. For, even if the District were free to implement their final offer during the interest arbitration process after impasse has been reached, as argued, the record here establishes that the collective bargaining process was ongoing and the Commission had not certified that the parties were at impasse when the Respondent unilaterally implemented part of its wage offer on June 30, 1986.

Further, we agree with the Examiner that the Respondent has failed to demonstrate any waiver by Complainant. The parties were discussing various aspects of implementation over a relatively reasonable period of time but it is clear that no agreement was reached. We conclude that the Respondent has failed to prove the defense of waiver.

Lastly, Respondent claims the implementation of the salary schedule was necessary to avoid the loss of state aids. The record established that there would be no "loss" of state aids but the worst case would be a mere postponement of the receipt of state aids. According to the testimony of Edwin Benter, Assistant Superintendent for Business Services, the amount of state aids is based, in part, on the expenditures for the prior year. 5/ If the Respondent did not implement the salary schedule by June 30, 1986, its state aid the next year would be less. If the schedule was implemented after June 30, 1986, the state aids would be paid the year after that. There is one exception which provides that if settlement or final offers are certified by October 31st following the June 30 date, the state aids will be granted. 6/ It follows that if Respondent did not implement the salary schedule, it would have not spent any funds on June 30, 1986 and it would get less state aids in the July 1, 1986 to June 30, 1987 period. If

it later expended those funds, then it would get state aid based on those expenditures in the July 1, 1987 to June 30, 1988 period. So there is no "loss", merely a delay in receiving the state aids.

The Respondent's contention of a temporary tax increase followed by a decrease appears improbable. Presumably, Respondent budgeted for the increases it agreed to for the 1985-86 school year but if these sums were not expended, they would not be immediately recouped, but the actual funds would be carried over in the next school year and presumably would be invested during the interim. Additionally, the Respondent presumably budgeted for the following year the amounts agreed to for salary with an offset for the aids expected; however, if there was no agreement by October 31st or no certified final offers, no funds would have to be expended until settlement or an arbitration decision. It might be at this point that retroactive payments might cause a budget problem but it would not be of long duration and a carefully worded retroactivity clause could eliminate this problem. Additionally, the evidence established that the District borrowed $2,000,000.00 less in the 1985-86 school year than the previous year to meet cash flow problems. 7/ It would appear that the Respondent has the ability to utilize short term borrowing to meet the temporary delay in receiving the $1.5 million in state aid. The record here indicates that the Respondent did not implement the entire wage agreement but merely implemented the 1985-86 salary schedule by making full retroactive payments on June 30, 1986. The 1986-87 salary schedule was not implemented but employes merely stayed on the 1985-86 schedule during the 1986-87 school year. The Respondent made this payment on the last day to qualify for recoupment as early as possible. This may be a very good business decision but we conclude it does not establish necessity.

Based on the above, we affirm the Examiner's conclusion that the Respondent, by its unilateral implementation of the salary and extra-curricular schedules and retirement contributions on June 30, 1986, violated its duty to bargain under MERA. We have modified the Examiner's Order to make the cease and desist portion more specific and to eliminate the affirmative portion thereof 8/ as we believe it is inapplicable given the context in which this dispute arose.

Dated at Madison, Wisconsin this 2nd day of September, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stephen Schoenfeld, Chairman

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Herman Torosian, Commissioner

5/ TR-47.

6/ TR-49.

7/ Ex- C-61.

8/ The Examiner had ordered the District to: "Bargain collectively with the Racine Education Association regarding salaries, extra-duty compensation and retirement contributions."