

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :  
WAUSAUKEE SCHOOL DISTRICT :  
Requesting a Declaratory Ruling : Case 24  
Pursuant to Section 111.70(4)(b) : No. 37746 DR(M)-413  
Wis. Stats., Involving a Dispute : Decision No. 24221  
Between said Petitioner and :  
WAUSAUKEE EDUCATION :  
ASSOCIATION :  
- - - - -

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Robert W. Burns, P. O.  
Box 1103, Green Bay, Wisconsin, 54302, appearing on behalf of the  
District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association  
Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin,  
53708, appearing on behalf of the Association.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER DISMISSING PETITION FOR DECLARATORY RULING

On October 24, 1986, the Wausaukee School District, herein the District, having filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to its duty to bargain with the Wausaukee Education Association, herein the Association, as to certain matters; and the Association having on November 10, 1986, filed a Motion to Dismiss said petition asserting that the petition was untimely filed; and the parties having submitted written argument with respect to said Motion, the last of which was received on December 22, 1986; and the Commission having considered the parties' arguments, makes and issues the following

FINDINGS OF FACT

1. That the Wausaukee School District is a municipal employer having its principal offices at Wausaukee, Wisconsin 54177.

2. That the Wausaukee Education Association is a labor organization functioning as the exclusive collective bargaining representative of certain employees of the Wausaukee School District and having its principal offices at Route 3, P. O. Box 278, Marinette, Wisconsin 54143.

3. That the District and the Association are currently engaged in collective bargaining over the terms of a successor to their 1984-1985 collective bargaining agreement covering the employees of the District represented by the Association; that following the filing of a petition for mediation-arbitration, Commission investigator Lionel Crowley, during his investigation of said petition, established a deadline pursuant to ERB 31.11 for the receipt of either party's

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That, pursuant to ERB 31.12(3) Wis. Adm. Code, the District's failure to file a petition for declaratory ruling within the 10-day period following service on the Commission of the District's April 18, 1986, written objections constitutes a waiver of the District's right to receive a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to the District's duty to bargain over the proposals referenced in the instant petition during negotiations over a successor to the 1984-1985 contract.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

That the instant petition for declaratory ruling is hereby dismissed.

Given under our hands and seal at the City of  
Madison, Wisconsin this 22nd day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/  
Herman Torosian, Chairman

Marshall L. Gratz /s/  
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/  
Danae Davis Gordon, Commissioner

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- 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.

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

(Footnote 1 continued on Page 3)

(Footnote 1 continued)

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.

WAUSAUKEE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER DISMISSING PETITION FOR DECLARATORY RULING

POSITIONS OF THE PARTIES

The Association contends ERB 31.12(3) establishes that a party's failure to file a declaratory ruling within the specified time period following the filing of written objections constitutes a waiver of those objections and yields a resultant conclusion that said proposals are mandatory subjects of bargaining for parties' remaining negotiations and mediation-arbitration proceedings. The Association asserts that the District clearly waived its bargainability objections to the provisions challenged in this declaratory ruling by its failure to timely file a petition following the April, 1986 letter of objection.

The Association further argues that the Commission's decisions in Madison Metropolitan School District, Dec. No. 16598-A (WERC, 1/79) and Racine Unified School District, Dec. No. 21689 (WERC, 5/84) establish that a party invoking the declaratory ruling process (which the Association asserts began herein by the filing of a letter of objection when the Wisconsin Employment Relations Commission Investigator has called for final offers and established a deadline for receipt of those objections) must timely litigate all of its objections in that declaratory ruling process. The Association contends that this fundamental premise is based upon the obvious need to protect the bargaining process from unnecessary delays and to prevent the abuse of the declaratory ruling procedures.

The Association asserts that nothing required the District to refrain from following its April, 1986 objection letter with a timely declaratory ruling petition. The Association asserts that presumably the District felt there was some tactical advantage in not doing so at the time. Nonetheless, the Association argues that once having initiated the declaratory ruling process, the District was required to resolve its challenges to all Association proposals objected to or to waive its right to do so for the duration of the parties' negotiations. The Association asserts the District's failure to follow through on its objections clearly influenced the parties' continued negotiations and, in particular, the Association's bargaining strategy since it was then known that the proposals in question were mandatory subjects of bargaining by operation of ERB 31.12(3) which could thus remain part of the Association's final offer for a successor agreement. The Association asserts that it would clearly be unduly disruptive and unfair to now change the negotiation "terrain" by allowing the District to revive its challenges contrary to ERB 31.12(3). The Association further argues the District should not be allowed to escape the necessary consequences of its waiver simply because the parties have continued to bargain. The Association therefore requests that the District's declaratory ruling petition be dismissed.

The District contends that the Association's various arguments and case citations would be relevant if the District had untimely filed a declaratory ruling petition pursuant to the April, 1986 objections or if the parties' final offers had been certified to a mediator-arbitrator. However, the District asserts that where, as here, the parties continued to exchange additional offers and counter-offers, the ongoing nature of negotiations preserved the District's ability to object again to the proposals at issue herein.

The District asserts that dismissal of the petition would be a harsh and drastic remedy which would frustrate the orderly process of collective bargaining and deny the ability of the District to challenge important provisions of the expired collective bargaining agreement. The District argues that the earlier objection letter, unaccompanied by petition, should not act as a permanent bar during these negotiations to a ruling from the Commission on the duty to bargain as to the disputed proposals.

## DISCUSSION

In our view, the provisions of ERB 31.12(3) are dispositive. Said rule provides:

(3) WHEN TO FILE. Such a petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If such a petition or stipulation is filed after the investigator calls for final offers, such a petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects of bargaining.

Here, the District in April, 1986 filed written objections to certain portions of the Association's final offer. ERB 31.12(3) provides that the party filing the objections then has 10 days within which to file its petition and that failure to timely file such petition renders the proposals in question mandatory subjects of bargaining for the duration of the parties' negotiations. The District did not file a petition for declaratory ruling within the 10 day period specified by the above-referenced rule and thus the District waived its right to contest the bargainability of those proposals for the duration of the negotiations in question.

We reject the District's contentions that the ongoing nature of negotiations should somehow produce a result contrary to the clear language of ERB 31.12(3). The waiver provision of ERB 31.12(3) furthers the underlying MERA purpose of having the Commission provide the parties a fair, speedy and above all peaceful procedure for the settlement of disputes. Section 111.70(6), Stats.; see generally, City of Madison and Racine Schools, noted in the statements of the parties' positions, above. It would ill serve that purpose to allow a resumption of negotiations and final offer exchanges affecting other matters to defeat the waiver-by-failure-to-file-petition rule as regards the provisions objected to by the District in April of 1986.

We have therefore granted the Association's Motion to Dismiss.

Dated at Madison, Wisconsin this 22nd day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/  
Herman Torosian, Chairman

Marshall L. Gratz /s/  
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/  
Danae Davis Gordon, Commissioner