STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case 100 No. 38135 MP-1921 Decision No. 24272-B

Appearances:

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

Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, by Ms. JoAnn Hart, Suite 600, 119 Martin Luther King, Jr. Blvd., P. O. Box 1664, Madison, Wisconsin 53701, appearing on behalf of the Respondent.

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

Examiner Raleigh Jones issued his Findings of Fact, Conclusion of Law and Order in the above matter on October 8, 1987. In that decision, the Examiner dismissed the complaint filed by the Association based on his conclusion that the Respondent's refusal to arbitrate the nine grievances listed in the complaint did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats. On October 14, 1987, the Association filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter submitted written argument, the last of which was received on November 27, 1987. Upon consideration of the Examiner's decision, the record, and the parties' written arguments, the Commission is fully advised in the premises and satisfied that the Examiner's Findings of Fact, Conclusion of Law and Order should be affirmed.

NOW, THEREFORE, the Commission issues the following

ORDER 1/

The Findings of Fact, Conclusion of Law and Order issued by the Examiner Raleigh Jones on October 8, 1987, shall be and hereby are affirmed and adopted as the Commission's Findings of Fact, Conclusion of Law and Order in the above matter.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

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

(Footnote 1/ continued on page 2)

1/ continued

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 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 therefore 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.

RACINE UNIFIED SCHOOL DISTRICT

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

BACKGROUND

The Association initiated this proceeding with a complaint that the District had violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by its written refusal on and after November 11, 1986, to participate in grievance arbitration proceedings concerning "post-expiration grievances" during the hiatus following the August 24, 1985 expiration of the parties' three-year 1982-85 agreement. The Association listed nine grievances in its complaint as representative of an unspecified number of grievances all of which allegedly were: triggered by events that occurred after that agreement expired; filed after that agreement expired; processed through joint selection of arbitrator; and, in at least one instance, processed through the scheduling of an arbitration hearing date.

In its answer, the District admitted most of the basic facts alleged as regards the grievances listed in the complaint, but it denied that its November 11, 1986, written refusal to arbitrate post-expiration grievances constituted a prohibited practice. As an affirmative defense, the District alleged that: arbitration is wholly contractual in nature; that the duty to maintain the status quo following expiration of the contract under Sec. 111.70 does not extend to arbitration; that the District did not unilaterally change working conditions by its refusal to arbitrate post-expiration grievances; that the District's contractual obligation to arbitrate grievances expired at the time the contract expired; and that the District has no contractual duty to arbitrate grievances arising after the expiration of the contract.

THE EXAMINER'S DECISION

The Examiner dismissed the complaint in its entirety. He found that the District had refused to arbitrate the nine listed grievances; that all nine of those grievances arose after expiration of the 1982-85 agreement; and that the District's refusal did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.

The Examiner rejected the Association's contention that the District's conduct constituted a Sec. 111.70(3)(a)4 unlawful unilateral change in a mandatory subject of bargaining. He cited prior Commission case law to the effect that the status quo which the MERA duty to bargain requires be maintained following expiration of an agreement does not include a previously existing contractual commitment to arbitrate grievances. Citing, Greenfield Schools, Dec. No. 14026-B (WERC, 10/76), among others.

The Examiner also rejected the Association's contention that the District had committed a Sec. 111.70(3)(a)5 violation of "an agreement to arbitrate questions arising as to the meaning or application of the terms of the collective bargaining agreement." The Examiner reasoned that because the 1982-85 agreement expired on August 24, 1985, and because the parties had not entered into any agreement to extend that agreement or the grievance arbitration provisions thereof, the requisite element of mutual consent to arbitrate did not exist as regards grievances arising after (i.e., based on events occurring after) the August 24, 1985 expiration.

The Examiner rejected the Association's reliance on the U.S. Supreme Court's 1977 decision in Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243, 84 LRRM 2753 (1977), wherein the Court held that in the absence of some contrary indication, it was appropriate to presume that the parties to an expired LMRA-covered private sector labor agreement mutually intended the unqualified grievance arbitration clause in the expired agreement to apply to a severance pay grievance filed four days after contract termination concerning the Company's closure of the plant immediately after the contract was terminated. The Examiner noted that the applicability of Nolde to the Wisconsin public sector has been raised by the Commission before but has not been decided. Citing, Greenfield Schools, supra; and Racine Schools, Dec. No. 19983-C (WERC, 1/85). He reasoned, however, that even if Nolde were deemed applicable to the Wisconsin public sector, it would not apply herein because the presumption of mutual consent to arbitrate grievances arising after expiration

would be rebutted by a 1974 Commission decision and the parties' subsequent bargaining history. Specifically, the Association and District were parties to a 1974 examiner decision affirmed by the Commission, wherein it was held that because there was no enforceable agreement on August 28, 1972 (following expiration of the 1971-72 agreement), the District was clearly not bound on that date to arbitrate a grievance arising during the hiatus. Racine Schools, Dec. No. 11315-B (1/74), aff'd -D (WERC, 4/74) at 20 (referred to herein as the 1974 decision). The parties did not materially modify the grievance arbitration language in the succeeding rounds of bargaining up through that leading to the 1982-85 agreement.

The Examiner also rejected the Association's claim that the District's duty to arbitrate should continue after expiration because the parties' final offers in their then-pending interest arbitration proceeding regarding a successor agreement contained identical grievance arbitration proposals. He cited Sauk County, Dec. No. 22557-B (WERC, 6/87) to the contrary and found no persuasive basis on which to except the instant situation from the principles developed therein.

Finally, the Examiner rejected what he described as "the Association's contention that the nine grievances should be arbitrated due to the District's participation in the grievance arbitration process prior to declining to arbitrate said grievances." He reasoned that the District did not obligate itself to complete the arbitration processing of the grievances by selecting the arbitrators in the nine cases or by agreeing to a hearing date in one of them before expressing in writing its refusal to arbitrate post-expiration grievances. "Foremost in reaching this conclusion is the fact that arbitration requires an agreement to arbitrate and here there was no mutual agreement to complete the arbitration of theses nine grievances after November 11, 1986. The Examiner also declined to infer an implicit or tacit agreement to arbitrate these nine grievances from the District's actions in light of the District's explicitly stated position to not arbitrate post-expiration grievances." Examiner decision at 8 (footnote omitted).

THE PETITION FOR REVIEW AND THE ASSOCIATION'S ARGUMENTS IN SUPPORT IN SUPPORT THEREOF

In its Petition for Review, the Association asserts that the Examiner erred: (1) by holding that Respondent had no duty to arbitrate post-expiration contract grievances in the absence of an express agreement to continue the grievance/arbitration portions of the expired labor agreement between the parties; (2) by holding that Respondent had no duty to arbitrate post-expiration grievances in the instant case because the contractual language regarding grievance arbitration had not been changed after 1971 and particularly after Nolde was decided in 1977; and (3) by holding that Respondent had no duty to arbitrate grievances in which they had engaged in the selection of arbitrators and/or had scheduled the grievances for arbitration hearings.

Neither the Petition for Review nor any of the arguments of any of the parties takes issue with any of the Examiner's Findings of Fact. The Association takes issue only with the Examiner's Conclusion of Law and Order.

The Association argues that because Nolde followed the 1974 decision, and because Nolde would have required just the opposite interpretation from that reached in that case, the absence of a material interim change in the contract grievance arbitration language through the 1982-85 agreement means that the District failed to obtain contract language sufficient to overcome the Nolde presumption of arbitrability of grievances arising after contract expiration. In other words, according to the Association, Nolde placed the burden of changing the existing language on the District, whereas the Examiner erroneously has placed it on the Association.

The Association argues that since nothing in the language of the expired 1982-85 agreement indicates the parties' intent not to arbitrate grievances arising after expiration of the agreement, mutual consent to arbitrate such matters must be strongly presumed. Citing, various federal court and NLRB decisions interpreting and applying Nolde. The Nolde principle holds that arbitration is the preferred means of resolving labor-management contract grievances disputes, and has long been recognized in the Wisconsin public sector. This is especially so where, as here, the parties' collective bargaining

relationship is a continuing one and "the Association will be able to process all of the pending grievances to arbitration once a successor agreement is achieved." Requiring the Association to wait until a successor agreement is achieved before it can arbitrate such matters serves no legitimate employer interest, tends to destroy the balance of power deemed essential in MERA, adversely affects employment peace by delaying speedy dispute resolution contrary to the statutory purposes expressed in Sec. 111.70(6), and "works a hardship on the labor organization because arbitrators are disinclined to remedy disputes involving transfers, scheduling or layoffs after an extended period of time."

The Association argues that under the standards developed in Nolde and its progeny in the Federal Courts and before the NLRB, at least some and arguably all of the nine listed grievances would be arbitrable. It argues that the Commission should therefore identify its own standards for Nolde application under MERA, apply those standards to the instant grievances, and fashion revised Conclusions of Law and Order in this matter accordingly.

In any event, the Association argues that the District should be equitably estopped from refusing to arbitrate post-expiration grievances by its participation in the selection of arbitrators in the nine cases cited in the complaint, by its participation in the scheduling of a hearing date in one of those cases, and by its failure to notify the Associaiton of its unwillingness to arbitrate post-expiration grievances until November 11, 1986, more than a year after the agreement expired. The principle of equitable estoppel should be applied against the District as it would be against any other employer because the public interests served by restricting its applicability as regards municipal corporations are not involved herein. It is in the public's interest to expedite the arbitrations at issue, and the application of equitable estoppel would therefore serve the public interest rather than undercut it. All of the necessary elements for equitable estoppel are present here, to wit, an action nor inaction by one party, which reasonably induces reliance by the other party, to the latter party's detriment. The District's action (participation in selections and scheduling) and its inaction (lengthy failure to notify the Association of an unwillingness to arbitrate post-expiration grievances) reasonably induced the Association to expect that the arbitrations would thereafter proceed without a District refusal to participate. The Association argues that the District's refusal has been detrimental to the Association's ability to carry out its contract administration duties and to meet its statutory obligation to fairly represent the employes in the instant bargaining unit.

Responding to District arguments, the Association asserts that the Legislature's 1986 enactment of a two-year limitation on contract duration (absent mutual agreement of the parties to a different term) does not foreclose application of Nolde since "the Commission has already chosen to indefinitely extend the status quo of other subjects of bargaining after the expiration of a contract. . . . and arbitration should be included among these subjects of bargaining. This position is consistent with and serves the purposes of, MERA." Nothing in the 1986 MERA amendments indicates an intent to undercut MERA's broader purposes of encouraging voluntary settlement and promoting labor peace. District reliance on res judicata and stare decisis as regards the 1974 Commission decision is without merit because that decision "was implicitly overruled by the U.S. Supreme Court" in Nolde. Finally, even if the limitations on equitable estoppel of governmental units described in Advance Pipe & Supply v. Revenue Department, 128 Wis.2d 431, 439-440 (1986) are applied herein, the District's change from initial willingness to participate in arbitration to its long-delayed statement of intent to refuse to complete the arbitrations of post-expiration grievances was "unconscionable" within the meaning of the Advance Pipe standard and hence appropriately equitably estopped.

ARGUMENTS OF THE DISTRICT IN OPPOSITION TO THE PETITION FOR REVIEW

The District urges that the Commission affirm the Examiner's decision and dismiss the complaint in its entirety.

It asserts that all nine of the grievances at issue in this proceeding concern events occurring after the expiration of the contract (citing, complaint, Paragraph 4) and that the District processed those claims through the parties' grievance procedure, but declined to arbitrate those grievances.

The District asserts that several well-settled Wisconsin case law principles ought not and cannot be deemed changed by the Nolde decision. The District states those principles as follows: The duty to arbitrate is wholly contractual, and a party cannot be compelled to arbitrate any dispute which the party has not agreed to submit to arbitration. Citing, Greenfield Schools, supra. After expiration of a contract, a party is not bound to arbitrate grievances arising during the hiatus. Citing, Id.; Racine Schools, Dec. No. 11315-B, -D, supra; and Gateway VTAE, Dec. No. 14142-A (1/77), aff'd in pertinent part, -B (WERC, 2/78). A refusal to arbitrate a post-expiration grievance is not a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats. Citing, Racine Schools, Dec. No. 19983-C, supra.

The District asserts that MERA prohibits the application of Nolde because Sec. 111.70(3)(a)4 has long prohibited a contract term of more than three years; because Sec. 111.70(4)(cm)8m was enacted in 1986 mandating a term of two years unless otherwise agreed by the parties; and because the Legislature did not take that post-Nolde opportunity to expressly recognize an implied obligation to arbitrate certain kinds of grievances arising during a hiatus.

The District argues that factors peculiar to the Wisconsin public sector negate the rationale underlying Nolde. Specifically, "in the Wisconsin public sector, ... municipal employers don't go out of business (even if they close a facility), and are covered by mandatory binding interest arbitration" whereby the union can retroactively "fill the gap" of the hiatus through an interest award despite the employer's position on the issue.

The District asserts that the Examiner correctly concluded that a Nolde presumption, if applicable to the Wisconsin public sector generally, would be rebutted by the facts of the instant case. Specifically, no Nolde-based presumption of a different meaning can overcome Commission's 1974 interpretation of the parties' language, especially in view of the absence of any material negotiated change therein during the intervening rounds of bargaining. Therefore, stare decisis, res judicata, and the parties' history of bargaining all require affirmance of the Examiner. The District argues that Nolde was a decision in another jurisdiction that read a different contract in a different way under a different law. It did not cause the meaning of the parties' agreement language to change. Moreover, Nolde was a hard case that made bad law. There is no basis in either the contract language or the facts of the grievances at issue here to make an exception to the Commission's settled law and prior decisions properly relied on by the District in this case.

The District also argues that in Greenfield Schools, supra, and Racine Schools, Dec. No. 19983-C, supra, (1/85), the Commisison squarely held that a refusal to arbitrate after expiration does not constitute a refusal to bargain. Hence, NLRB precedents to the contrary (if any survive recent changes in the NLRB's views in this area) cannot provide a basis on which to abrogate those post-Nolde Commission holdings.

The District further argues that even if Wisconsin law followed Nolde and its progeny, the Association has not proven by a clear and satisfactory preponderance of the evidence that any of the nine grievances is arbitrable. Several of them are not arbitrable under any circumstance. None of the nine grievances concerns rights which "vested or accrued" (became due and payable) under the expired collective bargaining agreement. At least some of the nine grievances are too remote in time from the expiration of the agreement to be arbitrable under Nolde. And at least some of the nine grievances involve "future practices" which are not arbitrable under a Nolde analysis. Citing, various Federal Court and NLRB decisions.

Finally, the District argues that there is no basis for the Association's claim that the District should be estopped from choosing not to arbitrate the grievances in question. The Examiner properly found that the District did not waive its right not to arbitrate the nine grievances at issue. The District at no time agreed to arbitrate any of those grievances, and the Association has not proved any such agreement. The Association has not sustained its burden of proving each of the elements of estoppel by the requisite clear, convincing and satisfactory evidence. Nor has the Association shown how the facts in this case require a finding that "it would be unconscionable to allow the (governmental entity) to revise an earlier position." Citing, Advance Pipe, supra, at 440.

The District's action and inaction must be viewed in the context of its right to refuse to arbitrate the grievances and its obligation to continue the grievance procedure in effect as a part of the status quo. The arbitration procedure is contained in the same agreement section as the grievance procedure, and there is no subheading or subsection titled "Arbitration." The language therefore does not indicate exactly where the grievance procedure stops and the arbitration procedure begins. Moreover, the District asserts, the Association produced no evidence that it relied on the District's actions/inactions in any way, or that it suffered any detriment as a result of any claimed reliance.

DISCUSSION

We have affirmed the Examiner's decision in its entirety. We agree with his analysis in all respects and find it unnecessary to quote from it at length or to reiterate it more fully than the summary set forth above. Instead, we have limited our discussion to the following comments which highlight, clarify and in one respect add to the Examiner's rationale.

First, a comment with regard to our affirmance as it relates to a portion of the Examiner's Finding of Fact 6. As a part of that Finding of Fact, the Examiner found that all nine of the grievances listed in the Complaint were triggered by events occurring after the August 24, 1985 expiration of the parties' 1982-85 agreement. Upon our review of the record we have discovered that one of those grievances (REA#23-03-86 which is Jt. Exhibit 2) states on its face that it relates to events occurring during the period August 6 through August 22, 1985, i.e., before expiration. We have nonetheless affirmed the Finding as issued by the Examiner. To do otherwise--e.g., to enter revised Findings and Conclusions treating that grievance as if it arose during the contract term--would, in the circumstances, be contrary to the principles of adjudicatory fair play mandated in General Electric v. WERB, 3 Wis.2d 227 (1958), 243 ("A board is not entitled to make a finding with respect to a situation that is not in issue."). For, not only has neither party taken issue with the Findings of Fact in the course of this review, but both parties litigated this case from the very beginning on the unequivocal and undisputed premise that the events triggering all nine of the grievances listed in the Complaint occurred after the August 24, 1985 expiration date.

Second, it should be noted that the Examiner's Conclusion of Law was addressed solely to the District's refusal to arbitrate grievances that were triggered by events occurring after agreement expiration. While the District's November 11, 1986 letter stated that it was refusing to arbitrate "post-expiration grievances," for the reason noted above, it cannot fairly be determined from the instant record whether the District included in that refusal all grievances filed after expiration or only those grievances filed after expiration which were triggered by events occurring post-expiration. While we have affirmed the Examiner's Conclusion of Law that the District acted lawfully in refusing to arbitrate the nine grievances deemed to have arisen after expiration, we are not holding herein that the expiration of the agreement relieved the District of the obligation to arbitrate grievances filed after expiration but concerning events arising during the term of the agreement. On the contrary, the Sec. 111.70(3)(a)5, Stats., duty not to violate an agreement to arbitrate is not extinguished--as regards a grievance concerning pre-expiration events--by the fact that the agreement expired before the grievance was initiated and/or fully processed through the grievance and arbitration procedures. In other words, the fact that a grievance arising prior to expiration has not been initiated or fully processed through contractual grievance and arbitration procedures by the time of expiration does not, alone, extinguish the contractual duty to complete those processes as to such grievances. See, e.g., Alma Center Schools, Dec. No. 11628 (WERC, 7/73) ("The fact that the 1971-72 agreement has expired does not excuse Respondents from arbitrating a dispute which arose during the term of said agreement." Id. at 8); and Abbotsford Schools, Dec. No. 11202-A (3/73) ("The fact that the agreement has now expired does not excuse the Respondents from their duty to remedy any breaches of the agreement arising during the term of the agreement." Id. at 8.), aff'd by operation of law, Dec. No. 11202-B (WERC, 5/73). Each of those cases cited with approval this agency's private sector decisions in Safeway Stores, Dec. No. 6883 (WERB, 9/64) (employer ordered

to arbitrate grievance filed after expiration because "the alleged contractual violation occured during the term of the agreement." Id. at 6.) and Kroger Company, Dec. No. 7563-A (WERB, 9/66) (to the same effect).

Third, the Examiner aptly noted that the Commission has not decided to date whether Nolde has any persuasive applicability in cases arising under MERA, or therefore in cases in which statutory binding interest arbitration is available to resolve impasses regarding successor contracts and their retroactivity. See, Racine Schools, Dec. No. 19983-C, supra, at 7 and Greenfield Schools, Dec. No. 14026-B, supra, at 6, Notes 6 and 10. Again in this case we conclude that it is unnecessary to resolve that question because, if Nolde were given any consideration herein, it would not alter the outcome reached by the Examiner. As the Examiner noted, the 1974 decision interpreting the grievance arbitration language at issue herein and the absence of any material negotiated change in that language through the 1982-85 agreement would rebut any Nolde-type presumption of continuing arbitrability of grievances concerning post-expiration events. The Nolde Court itself noted that its presumption was appropriate only "in the absence of some contrary indication" regarding the parties' mutual intent. Nolde, supra, 84 LRRM at 2756. In our opinion, the 1974 interpretation and the absence of a negotiated modification of the language so interpreted constitute such a "contrary indication" of controlling significance herein.

Fourth, we consider an additional controlling "contrary indication" to be the Sec. 111.70(3)(a)4, Stats., requirement that "The term of any collective bargaining agreement shall not exceed 3 years." To find that the parties' three-year 1982-85 agreement required arbitration of grievances concerning events occurring after its expiration would, as the District argues, extend the agreement beyond the statutory three year limitation. The parties cannot be presumed to have mutually intended an unlawfully long term of agreement, and even if they were, the Association would not be permitted to enforce an agreement beyond the statutory three year limit. See, City of Sheboygan, Dec. No. 19421 (WERC, 3/82) (provision automatically extending agreement throughout hiatus held nonmandatory because it did not expressly limit maximum possible term of collective bargaining agreement to three years).

The Association's reliance on the status quo doctrine to overcome statutory limits on term of agreement is misplaced. The status quo required to be maintained during a hiatus cannot include an obligation to arbitrate grievances because "the duty to arbitrate is wholly contractual," Greenfield Schools, supra, at 6, whereas "the duty to refrain from unilateral changes in mandatory subjects after expiration of a predecessor agreement derives from the statutory duty to bargain . . . not from an extension of the term of the predecessor collective bargaining agreement." Green County, Dec. No. 20308-B (WERC, 11/84) at 14.

Finally, we would add these comments regarding our agreement with the Examiner that the District did not obligate itself to complete any of the nine arbitrations at issue herein by its action and inaction after the August 24, 1985 expiration and prior to its written November 11, 1986 refusal to arbitrate post-expiration grievances. As the Examiner noted, there is no evidence of an agreement--oral or written--to arbitrate any of the nine grievances. The question therefore turns on whether the District is obligated to arbitrate some or all of these matters on the basis of equitable estoppel.

As the parties' recitations of applicable Wisconsin case law show, the party asserting equitable estoppel must prove each necessary element--action or inaction, reasonably inducing reliance, and detrimental reliance--by clear and convincing evidence. E.g., Advance Pipe, supra, and cases cited therein at 128 Wis.2d at 439-440. We agree with the District that the Association has failed

to prove that it relied to its detriment on the notion that the District would process the arbitration of these nine cases to completion.

Dated at Madison, Wisconsin this 1st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner