STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of AMERY SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and the NORTHWEST UNITED EDUCATORS	Case 26 No. 41295 DR(M)-457 Decision No. 25827

Appearances:

Mulcahy and Wherry, S.C., Attorneys at Law, by Mr. Richard J. Ricci, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 for the District.

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The Amery School District, having on November 17, 1988, filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling with respect to its duty to bargain with Northwest United Educators over certain matters; and the parties having waived hearing and have filed written argument in support of and in opposition to the petition, the last of which was received on December 12, 1988; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Amery School District, herein the District, is a municipal employer operating a school district in Wisconsin, and having its principal offices at 115 North Dickey Avenue, Amery, Wisconsin 54001.

2. That the Northwest United Educators, herein the Union, is a labor organization which since December 7, 1987 has functioned as the certified collective bargaining representative of certain non-professional employes of the District, and has its principal offices at 16 West John Street, Rice Lake, Wisconsin 54868.

3. That during collective bargaining between the District and the Union as to an initial collective bargaining agreement, the Union submitted the following proposal:

ARTICLE ____ - DURATION

> The term of this Agreement shall be from 1/1/88 through 6/30/89.

4. That the District contends that the Union proposal set forth in Finding of Fact 3 is a permissive subject of bargaining because the District, prior to the the filing of the Union's election petition, had entered into individual contracts with the employes now represented by the Union for the 1987-1988 school year, which contracts terminated on June 30, 1988; and that the District therefore submits that it has no duty to bargain with the Union as to the period from 1/1/88 to and including 6/30/88 because said period of time was covered by binding individual contracts.

5. That the proposal set forth in Finding of Fact 3 primarily relates to wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. That the existence of individual employment contracts between the District and employes now represented by the Union does not preclude the Union from seeking a contract duration which commences on 1/1/88.

2. That the Union proposal set forth in Finding of Fact 3 is a mandatory subject of bargaining.

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

DECLARATORY RULING 1/

That the District has a duty to bargain with the Union within the meaning of Secs. 111.70(3)(a)(4) and 1(a), Stats. as to the disputed proposal set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of December, 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 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

(Footnote 1 continues on page 3.)

(Footnote 1 continued from page 2.)

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.

AMERY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

POSITIONS OF THE PARTIES

The District

The District contends that since the employes of the District represented by the Union have already entered into individual contracts for the 1987-1988 school year, any collective bargaining can only commence upon the expiration of these individual agreements, namely on 7/1/88. The District argues that the employes who entered into such contracts were bound to the terms of that agreement for the duration of same and asserts that, as the employes have received the benefits of those individual contracts, the District should not be obligated to bargain wages, hours and conditions of employment for any period prior to July 1, 1988.

The District alleges that general principles of contract law must be balanced with the District's obligation to bargain. The District argues that it is statutorily charged with the responsibility of acting in the best interests of the public for its commercial benefit and insuring that the operations and functions of the District are and remain orderly. The District asserts that the position it takes herein is an effort to maintain budgetary stability during the period of time between the certification of the Union as the collective bargaining representative and the end of the 1987-1988 school year, at which time individual contracts terminate. If the Commission finds the Union proposal to be a mandatory subject of bargaining, the District asserts that the Commission will be concluding that an individual contract freely entered into by parties prior to a union certification is a voidable contract by only one of the parties thereto. The District asserts that if individual contracts can be negated at any time by the employe, employers will eventually refuse to enter into said agreements, and public policy considerations which are fostered by written contracts would be sacrificed.

The District argues that none of the cases recited by the Union are despositive of the status of individual contracts which were entered into prior to certification and which span a period of time after certification for which a budget has already been established. The District therefore asserts that its position in this matter can hardly be deemed frivolous and thus urges the Commission to reject the Union's request for costs and attorneys fees.

The Union

The Union asserts that the District's position that individual employment contracts are not subservient to the collective bargaining process is clearly without merit. Citing J.I. Case Company v. N.L.R.B., 321 U.S. 332 (1944) and Elmbrook Schools, Dec. No. 9163 (WERC, 12/70), the Union argues that both the U.S. Supreme Court and the Commission have concluded that individual contracts are subservient to collective bargaining agreements.

To the extent that the District is arguing that the individual contracts somehow constituted a waiver of the statutory right to bargain collectively for their duration, the Union argues that the individual contracts fall far short of the very high threshold of evidence needed to support a finding of a waiver of a statutory right. Again citing J.I. Case, the Union asserts that individual contracts also cannot be effective as a waiver of any benefit under a collective bargaining agreement. The Union argues that a finding in favor of the District's position herein would reduce the right to bargain to a "mere futility". The Union notes that in Faust v. Ladsymith-Hawkins School Systems, 88 Wis. 2d. 525 (1979), the Wisconsin Supreme Court concluded that an individual employment contract cannot be construed as a waiver of statutory rights under Sec. 118.22, Stats. The Union asserts that there is no rational distinction between an alleged waiver of statutory rights under Sec. 118.22, Stats. or Sec. 111.70, Stats. The Union also cites Racine County, Decision No. 10917-B (WERC, 7/73) wherein the Commission concluded that municipal employers clearly have a duty to bargain the retroactive nature of any wages, hours, and conditions of employment.

The Union concludes by arguing that the instant petition for declaratory ruling is without any basis in fact or in law. The Union therefore urges the Commission to award the Union reasonable attorney's fees and costs pursuant to Sec. 814.025, Stats.

DISCUSSION

Sec. 111.70(3)(a)4, Stats. 2/ establishes that where, as here, the Union becomes the employe's bargaining representative through use of our Sec. 111.70(4)(d) election procedures, the municipal employer's duty to bargain commences with the date on which we certify the election results. Thus, as of the date of certification, the municipal employer is obligated to bargain in good faith with the employes' bargaining representative on all matters which are primarily related to wages, hours and conditions of employment. The term or duration of a collective bargaining agreement is primarily related to wages, hours and conditions of employment. 3/ Therefore, we think it clear that either the union or the employer can, as a mandatory subject of bargaining, propose a contract term that commences on or after the date of the Commission certification.

The District does not appear to contest any of the foregoing. Rather it claims that where, as here, the employes in the unit signed individual contracts with the District prior to the filing of the election petition which ultimately led to the Union's certification and where, as here, the term of those individual contracts extends until June 30, 1989, the Union cannot require that the District bargain over an agreement which will commence any time prior to July 1, 1988. We disagree.

It is well established that individual employe contracts are subservient to collective bargaining agreements. In Elmbrook Schools, Dec. No. 9163-C (WERC, 12/70) we held:

> ". . . in harmony with the language of the Supreme Court as expressed in J.I. Case Co. v. N.L.R.B. supra., the individual teacher contracts were subsidiary to the terms of the collective bargaining agreement reached between the Association and the School Board, and the individual teachers could not waive the benefits of said agreement, which benefits are open to every employe of the represented unit, whatever the type or terms of his pre-existing contract of employment." (emphasis from original).

As noted in the above quote, we relied in part upon the rationale of the U.S. Supreme Court in J.I. Case v. N.L.R.B. 321 U.S. 332 (1944). The Court therein stated:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or conditions the terms of the collective agreement. 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' National Licorice Co. v. National Labor Relations Board, (1940), 309 U.S. 350, 60 S. Ct. 569, 84 L. Ed. 799, (1939 Mem. Dec.) 308 U.S. 535, 60 S. Ct. 108, 84 L. Ed. 451.

2/ Sec. 111.70(3)(a)4 Stats. provides in pertinent part:

> An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the Commission.

3/ City of Sheboygan, Dec. No. 19421 (WERC, 3/82).

> Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.
>
> "It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment."

Given the foregoing, we are persuaded that the District's position must fail. To rule to the contrary would be to allow individual contracts to supersede the collective bargaining process, to, in the Court's words, "forestall bargaining or to limit or condition the terms of the collective agreement", and to establish a limitation upon the duty to bargain which has no support in the language of Sec. 111.70 Stats. 4/

We reject the Union's request for attorneys fees and costs. While we have found the contentions advanced by the District to be without merit, we do not find that they exceeded the bounds outlined in Commissioner Torosian's concurring opinion 5/ in Madison Schools, Dec. No. 16471-D (WERC, 5/81), aff'd in perti-

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4/ Of course, our conclusion that the District must bargain over the Union's duration clause does not prevent the District from seeking to persuade the Union or, if necessary, the interest arbitrator that any wages and benefits increases paid pursuant to the individual contracts should be taken into consideration in the parties bargaining over said subjects. Obviously, we take no position as to the merits of any such persuasive efforts.

5/ That opinion read:

> While I concur with the majority that attorneys fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorneys fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, (Dec. No. 12053-A, B (WERC, 12/73)) the Commission should be reluctant to grant attorneys fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorneys fees in exceptional cases where an extraordinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National Labor Relations Board stated its intentions ". . . to refrain from assessing litigation expenses against a respondent, not withstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repitition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."
>
> In my opinion limiting the granting of attorneys fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging frivolous litigation and to protect the integrity of our process.

nent part, MTI v. WERC, 115 Wis. 2d. (623 Ct. App. 1983). Accordingly, we do not find it appropriate to order costs or attorneys fees in the instant circumstances.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner