STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN DELLS SCHOOL DISTRICT EMPLOYEES UNION, LOCAL 1401-A, AFSCME, AFL-CIO, Complainant, vs. WISCONSIN DELLS SCHOOL DISTRICT, Respondent.	Case 21 No. 41771 MP-2197 Decision No. 25997-B

Appearances:
Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, for the Complainant.
Mr. Karl L. Monson, Consultant, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant Wisconsin Dells School District Employees Union, Local 1401-A, AFSCME, AFL-CIO having, on February 13, 1989, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent Wisconsin Dells School District had committed prohibited practices within the meaning of the Municipal Employment Relations Act; and Complainant having subsequently filed amended complaints dated February 28, April 14 and April 27, 1989; and by Order dated May 10, 1989, the Commission having appointed David E. Shaw to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and the Examiner having, on May 10, 1989, issued a Notice of Hearing which inter alia directed the Respondent to file an answer to the complaint with the Commission on or before June 8, 1989; and Respondent having filed an answer on June 12, 1989; and Complainant having filed a Motion with the Examiner on June 12, 1989 asking that the Respondent's failure to file an answer on or before June 8, 1989 be found to warrant a determination that Respondent had admitted all facts alleged in the complaint as provided by ERB 12.03(6); and the Examiner having thereafter advised Complainant by letter dated June 13, 1989 that on June 9, 1989 he had granted Respondent's request that the answer date be extended to June 12, 1989 because of clerical problems and that Respondent had attempted to contact Complainant in that regard on June 9, 1989; and Complainant having on June 22, 1989 filed with the Commission a Motion to Set Aside Examiner's Decision, Dismiss Respondent's Answer and Grant Complainant's Prayer for Relief; and the parties thereafter having filed written argument in support of their respective positions; and the Commission having on August 18, 1989 issued its Order Denying Complainant's Motion to Set Aside Examiner's Decision, Dismiss Respondent's Answer and Grant Complainant's Prayer for Relief 4/; and hearing on the amended complaint having been held at Wisconsin Dells, Wisconsin on October 24, 1989; and the parties having completed the filing of post-hearing briefs by December 30, 1989; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Wisconsin Dells School District Employees Union, Local 1401-A, AFSCME, AFL-CIO, hereinafter the Complainant, is a labor organization with its principal offices located at 5 Odana Court, Madison, Wisconsin 53719; that since August 12, 1987 Complainant has been the certified exclusive collective bargaining representative of all regular full-time and regular part-time employes of the School District of Wisconsin Dells, excluding supervisory, managerial, confidential and professional employes 5/; that at all times material herein Laurence Rodenstein has been the chief negotiator and representative for the Complainant; and that at the time of hearing in this matter Millie Kent was Complainant's president.

2. That Wisconsin Dells School District, hereinafter Respondent, is a municipal employer with its principal offices located at 811 County Trunk Highway H, Wisconsin Dells, Wisconsin.

3. That the Complainant and Respondent commenced negotiations for an initial collective bargaining agreement on or about November 10, 1987, at which

---

4/ Decision No. 25997-A (WERC, 8/89).

5/ Decision No. 24604-B (WERC, 8/87).

time the Complainant gave the Respondent its proposal for an initial agreement; that at all times material herein Karl Monson was the chief negotiator for the Respondent; that on January 13, 1988 Respondent gave the Complainant's bargaining team the Respondent's first written proposal for an initial agreement; that the Complainant and Respondent then met approximately three times face-to-face for negotiations on an initial agreement; that on or about April 21, 1988 the Complainant and the Respondent began participating in mediation of their dispute over the terms and conditions of an initial agreement; and that the mediation process included one face-to-face session and approximately six mediation sessions with a mediator from the Commission's staff, the last session being held on October 24, 1988, at which time a tentative agreement was reached.

4. That during the mediation process, but between meetings, Monson sent Rodenstein a second written proposal from the Respondent for an initial agreement; and that said second proposal, in part, contained the following proposals:

ARTICLE 4

Dues Deduction/Fair Share

4.01The School Board agrees to deduct from the salaries of employees, who are members of the AFSCME Local 1401-A, the dues as authorized by individual members.

Dues will be deducted in twenty-four (24) equal installments beginning with the September 10 check, except those on summer break or unpaid leave of absence shall not have any dues deducted during their break.

Dues deducted will be transferred to Local 1401-A's treasurer at the end of each quarter of the school term.

4.02All employees within the bargaining unit shall be required to pay as provided in this Article, their fair share of the cost of representation by the Union. No employee shall be required to join the Union, but membership in the Union shall be available to all employees who apply consistent with the Union constitution and bylaws. No employee shall be denied Union membership because of race, creed, color, or sex. Those employees who in 1987-88 did not join the Union as of July 1, 1988, shall be exempt from the provision until such time as they voluntarily join.

4.04(sic) The Union shall indemnify and save the School District of Wisconsin Dells harmless against any and all claims, demands, suits, orders, judgments, or any other forms of liability that shall arise out of, or by reason of, action taken or not taken by the Employer which action or non-action is in compliance with the provisions of this Article and in reliance on any list, certificates, or other information furnished to the Employer pursuant to this Article, including, but not limited to, indem-nification of damages and costs of court or administrative agency decisions and reasonable. (sic)

4.05Those employees who, because of religious con-victions, hold objections to this provision shall be exempt from the requirements of this Article.

4.06In the event that the Union, its officers, agents, or any of its members acting individually or in concert with one another, engage in or encourage any work stoppage against the Employer, the deductions and payments of the fair share contributions made in accordance with this Agreement, and also including any voluntary dues deduction privileges, shall be terminated.

. . .

ARTICLE 6

Probation

6.01Probation.

All newly hired employees shall be on probation for a period of sixty (60) days. Probationary employees may be disciplined or terminated from employment by the Board except for reasons that are arbitrary or capricious. If an employee quits or is terminated during the probation period, no sick leave, vacation, or other benefits shall be due him or her.

6.02Employees who have completed the probationary period satisfactorily and are continued thereafter shall have a permanent status and shall be entitled to all rights protection and (sic) granted by this Agreement retroactive to the original date of employment. Hospital insurance coverage, paid holidays, and sick leave are made available to employees on the first (1st) of the month following completion of sixty (60) calendar days of employment.

ARTICLE 7

Disciplinary Procedure

7.01Excluding probationary employees, no employee will be suspended, demoted, discharged, or otherwise disciplined except for just cause.

7.02Written warnings will remain in effect for a period of eighteen (18) months.

7.03When an employee is disciplined, a steward shall be present if available.

. . .

ARTICLE 9

Seniority

. . .

9.08Job Posting and Transfer.

A. When filling vacancies within a job category, making promotions, or where new jobs are created within a job category in the bargaining unit, those regular employees with the most seniority in the job category shall be given preference in filling such vacancies, provided that among internal applicants, no employee is objectively superior on the basis of skill and ability.

B.When a vacancy occurs, a notice shall be posted no less than five (5) working days after the vacancy has occurred. Vacancies shall be posted for five (5) workdays. Employees wanting such posted jobs shall communicate, in writing, their interest to the person designated in the notice. A copy of the notice shall be provided to the Union. Vacancies occurring between June 1 and September 1 shall be advertised on one occasion in the official school paper. The notice shall include the following statement: "Current employees shall receive preference for this position."

C.Any employee selected to fill a vacancy shall be given at least (15) working days to qualify, and this period may be extended by mutual agreement.

9.09An employe shall lose seniority in the event the employee:

A.retires, resigns or is discharged for just cause.

B.is not recalled from layoff for a period of two (2) years.

C.is recalled from layoff and does not report for work within fifteen (15) days after a notice of recall is sent to the last known address by certified mail.

D.does not return at the expiration of a leave of absence.

E.is absent from work without notification to the District.

. . .

ARTICLE 11

Overtime

11.01Time and One-Half.

All hours worked over forty (40) hours in one (1) week shall be paid at time and one-half (1 1/2) of the regular hourly wage.

. . .

11.04Building Checks.

All boiler and building checks required of employees on Saturdays, Sundays, or paid holidays shall be paid for at the rate of time and one-half (1 1/2). The Employer will make every attempt to schedule such checks ahead on a two to three month basis so that employees may adequately plan their weekends. Employees shall be paid a minimum of four (4) hours a time and one-half (1 1/2) for each day they perform building checks.

. . .

11.06Computation.

For the purpose of computing overtime pay, all hours paid for shall be considered hours worked.

ARTICLE 12

Insurance

12.01For regular and school year full-time employees, the District will contribute eighty-five percent (85%) of the premium for a family policy for medical/hospitalization insurance. One hundred percent (100%) will be contributed towards a single policy for medical/hospitalization insurance.

The District will pay the applicable deductible.

12.02The School District shall pay $9.00 toward a single dental insurance plan and $26.50 toward a family dental plan for regular and school year full-time employees.

12.03Group Life Insurance.

Employees shall have the opportunity to be covered by group life insurance. The amount of insurance on the life of each employee shall be equal to his annual salary rounded to the nearest $1,000.

The District will pay one hundred percent (100%) of the premium.

12.04Part-time employees eligible for group insurance shall receive a pro-rated premium payment based on the percent of the working day actually employed.

12.05Disability Insurance.

Employees shall have the option to be covered by group long-term disability insurance. The coverage will begin after one hundred twenty (120) calendar days and will pay ninety percent (90%) of gross salary.

The District will pay $4.00 toward the premium (of a $7.00 premium).;

and that Monson's cover letter accompanying the Respondent's May 16, 1988 proposal contained the statement "The school board reserves the right to amend, add to, delete or otherwise change any of the above."

5. That the following proposals contained in the Respondent's May 16, 1988 proposal were the same as that proposed by the Complainant in its proposal for an initial agreement: Article 4, Dues Deduction/Fair Share; Article 5, Grievance Procedure; Article 9, Seniority, Section 9.08 - Job Posting and Transfer; and Article 11, Overtime, Section 11.06 - Computation; that the proposal with regard to Article 6, Probation, contained in Respondent's May 16, 1988 proposal was consistent with its initial January, 1988 proposal, in that it proposed a sixty (60) day probation period; and that the Complainant had previously indicated its willingness to agree to a sixty (60) day probation period.

6. That on or about June 2, 1988 Monson sent Rodenstein a third written proposal from the Respondent for an initial agreement; that Rodenstein had not communicated any response to Monson or any other agent of the Respondent with regard to the Respondent's May 16, 1988 proposal prior to receiving the

Respondent's June 2, 1988 proposal; that in his cover letter accompanying the Respondent's June 2, 1988 proposal Monson stated "the school board response dated May 16, 1988, is null and void"; that no tentative agreements were reached based on the Respondent's May 16, 1988 proposal prior to its making the June 2, 1988 proposal; that the Respondent's June 2, 1988 proposal, in part, contained the following proposals which differed from its May 16, 1988 proposal:

ARTICLE 4

Dues Deduction

4.01 Membership Dues Deduction.

Upon receipt of a dues deduction authorization form signed and dated by the employee, the Board shall deduct from the employee's paycheck the amount of Union dues.

a. All dues deduction authorizations shall be submitted to the Administration no later than the Friday at the end of the second full week of school. Deductions shall be deducted monthly from each employee's paycheck.

Should an employee begin work for the District after the second full week of school, the District shall deduct dues from that employee on the first payroll period (if practical) after receipt of a dues deduction authorization form signed and dated by the employee.

b. In the event an employee leaves the employ of the District before the payment has been de-ducted or in the event an unforeseen circum-stance causes the individual employee to receive no paycheck or a paycheck which is insufficient to cover the dues deduction, the District's responsibility for collection and deduction ceases.

ARTICLE 5

Grievance Procedure

. . .

(added)
i. Employees who voluntarily terminate their employment will have their grievances immediately withdrawn and will not benefit by any settlement of any other grievance at a later date.

ARTICLE 6

Probation

6.01Probation.

All newly hired employees shall be on probation for a period of six (6) months. Pro-bationary employees may be disciplined or terminated from employment by the Board except for reasons that are arbitrary or capricious. If an employee quits or is terminated during the probation period, no sick leave, vacation, or other benefits shall be due him or her.

. . .

ARTICLE 7

Disciplinary Procedure

. . .

7.03When an employee is disciplined, a steward shall be present if available and requested by the employee.

. . .

ARTICLE 9

Seniority

. . .

9.08Job Posting and Transfer.

A.When filling vacancies within a job category, or where new jobs are created within a job category in the bargaining unit, those regular employees with the most seniority in the job category shall be given preference in filling such vacancies, provided that among internal applicants, no employee is objectively superior on the basis of skill and ability.

. . .

9.09An employe shall lose seniority in the event the employe:

. . .

D.does not return within three (3) workdays at the expiration of a leave of absence.

E.is absent from work for three (3) or more workdays without notification to the District.

. . .

ARTICLE 11

Overtime

11.01Time and One-Half.

All hours worked over forty (40) hours in one (1) week shall be paid at time and one-half (1 1/2) of the regular hourly wage. There should be no pyramiding of overtime.

. . .

11.04Building Checks.

All boiler and building checks required of employees on Saturdays, Sundays, or paid holidays shall be paid for at the rate of time and one-half (1 1/2). The Employer will make every attempt to schedule such checks ahead on a two to three month basis so that employees may adequately plan their weekends.

. . .

(deleted)
11.06 Computation.

ARTICLE 12

Insurance

12.01For regular full-time employees, the District will contribute up to $226.95 of the premium for a family policy for medical/hospitalization insurance. Up to $100 will be contributed towards a single policy for medical/hospitalization insurance.

12.02The School District shall pay $9.00 toward a single dental insurance plan and $26.50 toward a family dental plan for regular full-time employees.

12.03Group Life Insurance.

Employees shall have the opportunity to be covered by group life insurance. The amount of insurance on the life of each employee shall be equal to his annual salary rounded to the nearest $1,000.

The District will pay twenty percent (20%) of the premium.

12.04Regular part-time employees eligible for group insurance shall receive a pro-rated premium payment based on the percent of the working day actually employed.

7. That the Respondent's May 16, 1988 proposal was the result of a meeting of Respondent's Board of Education, herein Board, at which less than the full Board was present; and that the Respondent's June 2, 1988 proposal was a result of a meeting of the members of the Board's Bargaining Committee, at which there were different Board members present from the meeting that generated the May 16, 1988 proposal.

8. That the parties reached a tentative settlement on their initial collective bargaining agreement on October 24, 1988; that the Respondent ratified the settlement in November of 1988; that the Complainant ratified the settlement in December of 1988 and that the initial collective bargaining agreement was signed on December 16, 1988; and that said Agreement contained provisions from the Respondent's June 2, 1988 proposal that reflected changes from its May 16, 1988 proposal, including the following: Section 6.01, Section 9.03, Sections 9.08, A and 9.09, D and E, Sections 11.01 and 11.04, and Sections 12.01, 12.03 and 12.04.

9. That at least since 1980 the Respondent provided its employes in the Cook and Assistant Cook classifications with a free hot lunch benefit; that said benefit was also provided to Grace Schmitz, a Secretary at the Respondent's elementary school; that at a meeting approximately two days prior to the start of the 1987-1988 school year, the Respondent's Food Service Manager, Beverly Rothe, gave the cooks a notice entitled "General Information" which, in part, stated:

COOK'S LUNCHES

Cooks may eat hot lunch without paying for them. You are to be counted on your daily lunch count.;

that sometime prior to the start of the 1988-1989 school year the Respondent's auditor completed an audit and informed the Respondent's then Superintendent of Schools, Gerald Peterson, that the Respondent's hot lunch program was operating at a deficit and recommended that the Respondent consider requiring the cooks to pay for their lunches, rather than providing them with a free lunch; that Peterson, without Board action, decided to end the free lunches for the cooks with the start of the 1988-1989 school year based upon the auditor's recommendations; that Rothe thereafter issued all of the cooks a memorandum dated August 26, 1988, which memorandum, in relevant part, stated:

Mr. Peterson received a summary of our lunch report from the

> district auditor and he informed him that cooks should be paying for their hot lunch. So starting this year you will have to pay for your hot lunch at the rate of $1.50 per day. No snacking on food from the kitchen by any school personnel. Also, due to the recent audit some reduction of hours will have to be taken, because of the reduction of participation.;

that effective with the start of the 1988-1989 school year the Respondent's cooks and Schmitz have been required to pay for their hot lunches; that the Respondent did not notify the Complainant that it was ending the free lunches and did not offer to bargain with Complainant with regard to ending the practice of providing the free lunch benefit; that at a subsequent mediation session, during a discussion with the mediator, Monson, and Peterson in the hallway regarding pending issues, Rodenstein raised the issue of the Respondent's having ceased the free lunch practice and Monson and Peterson assured him verbally that the matter would be "taken care of" and the practice reinstated; that based on the verbal assurances given by Monson and Peterson the Complainant did not propose the inclusion of any provisions in the Agreement regarding the practice of providing the free hot lunches; that the assurances Rodenstein received from Monson and Peterson constituted an agreement to reinstate the practice of providing the free lunch benefit for the cooks and Schmitz; that the Respondent did not restore the free lunch benefit for the cooks and Schmitz following that conversation or following the ratification of the parties' initial Agreement; that Complainant filed a grievance with Respondent with regard to the latter's failure to reinstate the free lunch; that on December 23, 1988 Louann DuPlayee, an Assistant Cook and steward for the Complainant, Jan Volz, Head Cook at Wisconsin Dells Grade School, and Paul Commacho, a Custodian at the school, discussed the grievance with Peterson in the cafeteria of the school; that in the course of said discussion Peterson told DuPlayee that he thought the Board intended to grant the remedy requested by the grievance, but that he needed her to get him information with regard to how many employes were involved, the cost of reimbursing them for lunches they had paid for and the cost of providing the free lunches; that thereafter DuPlayee gathered the information that Peterson had requested, but did not provide it to him and Peterson did not thereafter ask her for it or tell her he needed the information; that at a subsequent meeting on January 24, 1989, Respondent's Board considered and denied the grievance and the Complainant restated its position before the Board that it wished to bargain the decision and the effects regarding the discontinuation of the free meal benefit and again restated its desire to bargain in a January 25, 1989 letter to the Board's chairperson; and that the Respondent has refused, and continues to refuse to bargain over the decision and effects regarding the discontinuance of the free lunch benefit and has refused to reinstate that benefit.

10. That in its first and second written proposals for an initial agreement the Respondent proposed to pay eighty-five percent (85%) of the premium for a family policy and one hundred percent (100%) of the premium for a single policy of medical/hospitalization insurance; that in its third written proposal the Respondent proposed to pay $226.95 toward the premium of a family policy and $100.00 toward the premium of a single policy of medical/hospitalizationn insurance; that said dollar amounts were characterized by Respondent as representing 85% of the premium for the family policy and 100% of the premium for the single policy, and the Respondent's representatives did not inform or advise the Complainant's representatives during the negotiations and mediation sessions that said dollar amounts were only based on an estimate of the premiums the Respondent had received from its health insurance carrier, WEA Insurance Trust, (WEAIT) on March 14, 1988; that those estimates were $100.00 for the monthly premium for a single policy and $267.00 for the monthly premium for a family policy; that on August 29, 1988 the Respondent received notice from WEAIT that the actual monthly premiums for its group health insurance would be $103.00 for the single policy and $269.76 for the family policy; that the Respondent did not inform the Complainant of the actual amounts for the monthly premiums of the single and family policies for group health insurance; that the parties' initial agreement incorporated the figures of $226.95 for a family policy and $100.00 for a single policy of group health insurance; that Complainant's agreement to those dollar amounts was based on the understanding that the amounts represented 85% of the monthly family premium and 100% of the monthly single premium for group health insurance for the first year of the parties' Agreement; that the parties' initial Agreement includes the following:

Side Agreement
Between
The School Board, School District of Wisconsin Dells
And
The Wisconsin Dells School District Employees Union
Local 1401-A, WCCME, AFSCME, AFL-CIO

Subject: Medical/Hospitalization Insurance and Dental Insurance Premiums

During the labor agreement years of 1989-90 and 1990-91, the Employer shall pay up to 85 percent (expressed in

dollars and cents) of the monthly family premium and 100 percent (expressed in dollars and cents) of the monthly single premium for eligible employee(s) for medical/hospitalization insurance.

During the labor agreement years of 1989-90 and 1990-91, the Employer shall pay up to 65 percent (expressed in dollars and cents) of the monthly family premium and 70 percent (expressed in dollars and cents) of the monthly single premium for eligible employee(s) dental insurance.

During the labor agreement years of 1989-90 and 1990-91, the Employer shall pay up to 57 percent (expressed in dollars and cents) of the monthly premium for those employees who opt to take long-term disability insurance coverage.

It is expressly agreed that this side agreement shall terminate in force and effect as of midnight, June 30, 1991.

FOR THE BOARD **FOR THE UNION**

(signature) (signature) Date: 11-15-88 Date: 12/16/88

and that it was the intent of the parties to agree to dollar amounts that reflected 85% of the monthly premium for the family policy and 100% of the monthly premium for the single policy of group health insurance for the first year of their Agreement.

11. That during the negotiations and the mediation process both the Complainant and the Respondent proposed and eventually agreed to the disability insurance provision that is contained in their initial Agreement; that said provision in their Agreement reads as follows:

12.05 Disability Insurance: Employees shall have the option to be covered by group long-term disability insurance. The coverage will begin after 120 calendar days and will pay 90% of gross salary.

The District will pay $4.00 toward the premium (of a $7.00 premium).

that said disability insurance provision provided for the same plan as that covering the teachers in the Respondent's employ; that both Complainant's representatives and Respondent's representatives believed that such coverage was available for the employes represented by the Complainant; that after the parties ratified their initial Agreement Peterson contacted WEAIT and attempted to obtain the agreed upon disability insurance coverage from WEAIT, the carrier for the disability insurance plan covering the Respondent's teachers; that the agent for WEAIT, Peter Antonie, subsequently informed Peterson that such coverage was not available from WEAIT for the Respondent's support staff personnel; that thereafter Peterson contacted Complainant's then president, Guy Gamble, and advised him of the problem the Respondent was having obtaining the agreed upon disability insurance coverage; that Peterson also contacted Rodenstein in January or February of 1989 regarding the Respondent's problem in obtaining the agreed upon disability insurance coverage and advised Rodenstein to contact Antonie, and Rodenstein told Peterson that Complainant would give the Respondent some latitude, but that the Respondent needed to obtain the coverage as soon as possible; that the Respondent solicited bids for said coverage and ultimately received bids from both WEAIT and General Casualty Insurance Company for the agreed upon coverage; that the bid from WEAIT was received on June 8, 1989, and ultimately accepted by Respondent; that said coverage provided by WEAIT was implemented October 1, 1989; that between Peterson's contacting Gamble in January or February of 1989 and the implementation of the coverage in October of 1989, Tom Bogum succeeded Gamble as Complainant's President and Bogum was, in turn, succeeded by Millie Kent; that during the 1988-1989 school year a custodian at the Respondent's High School, Beverly Gamble, was injured and ultimately resigned from her employment with Respondent at the end of the 1988-1989 school year and Complainant has alleged that she is entitled to disability insurance benefits under the agreed upon disability insurance coverage.

Based upon the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the decision of the Respondent to discontinue the practice of providing the free hot lunch benefit for its cooks and the one secretary, and the impact of that decision, are mandatory subjects of bargaining over which the Respondent had a duty to bargain with Complainant.

2. That by unilaterally deciding to discontinue, and then discontinuing the practice of providing the free hot lunch benefit for its cooks and the one secretary at the start of its 1988-1989 school year, without first bargaining that decision with the Complainant, and by refusing to reinstate that benefit, the Respondent Wisconsin Dells School District, its officers and agents, have refused to bargain collectively with Complainant in violation of Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

3. That by failing and refusing to reinstate the practice of providing the free hot lunch benefit after having agreed that it would be reinstated, and after the parties had reached agreement on and ratified their Collective Bargaining Agreement, the Respondent Wisconsin Dells School District, its officers and agents, violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

4. That by failing and refusing to pay the equivalent of 85% of the monthly premium for the family group health insurance plan and the equivalent of 100% of the monthly premium for the single group health insurance plan for the first year of their Agreement, as required by Article 12 - Insurance and Retirement, Section 12.01, of the parties' Agreement, the Respondent Wisconsin Dells School District, its officers and agents, violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

5. That by failing to provide its employes represented by Complainant with the option of being covered by the agreed upon disability insurance coverage as required by Article 12 - Insurance and Retirement, Section 12.05, of the parties' Agreement, within a reasonable time after the Agreement was ratified, the Respondent Wisconsin Dells School District, its officers and agents, violated Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

6. That by making its proposal of June 2, 1988, which nullified its proposal of May 16, 1988, the Respondent Wisconsin Dells School District, its officers and agents, did not refuse to bargain collectively in violation of Sec. 111.70(3)(a)4, Stats.

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

ORDER 6/

It is hereby ordered that:

1. Those portions of the complaint and amended complaints alleging violations of Secs. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1, Stats., with regard to the Respondent's June 2, 1988 proposal are hereby dismissed.

2. The Respondent Wisconsin Dells School District, its officers and agents, shall immediately cease and desist from violating its duty to bargain under the Municipal Employment Relations Act by unilaterally discontinuing the practice of providing the free hot lunch benefit for certain of its employes in the bargaining unit represented by the Complainant, Local 1401-A, AFSCME, AFL-CIO, and refusing to reinstate said benefit.

3/ 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.

3. The Respondent Wisconsin Dells School District, its officers and agents, shall immediately take the following affirmative action which the Examiner finds will effectuate the purpose of the Municipal Employment Relations Act:

(a)Make whole all of those employes in the bargaining unit represented by Complainant affected by the unilateral discontinuation of the free hot lunch benefit by reimbursing those employes for the costs they paid for the meals, retroactive to the start of the 1988-1989 school year, plus interest at the rate of twelve percent (12%) per year 7/ on those costs from the dates they were incurred to the date they are refunded; and immediately reinstate the practice of providing the free hot lunch benefit for those employes.

(b)Make whole all of those employes in the bargaining unit represented by Complainant by reimbursing them for the amount they paid toward the group health insurance premiums over and above the amount they would have paid had the Respondent paid the equivalent of eighty-five percent (85%) of the monthly premium for the family plan and one hundred percent (100%) of the monthly premium for the single plan during the first year (1988-89) of the parties' Collective Bargaining Agreement, plus interest at the rate of twelve percent (12%) per year on the excess amount charged from the dates said amounts were paid to the date they are refunded.

(c)Stand as the provider of the disability insurance coverage agreed upon and included in Article 12 - Insurance and Retirement, Section 12.05 Disability Insurance, of the parties' Collective Bargaining Agreement, for the employes in the bargaining unit for the period beginning January 1, 1989 until the coverage from WEAIT began.

(d)Notify all of its employes in the bargaining unit represented by the Complainant by posting, in conspicuous places in its place of business where such employes are employed, copies of the notice attached hereto and marked "Appendix A" That notice shall be signed by the Superintendent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

(e)Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 5th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employes that:

1.WE WILL immediately reinstitute the practice of providing the free hot lunch benefit for those employes in the Head Cook/Assistant Cook classification and the Secretary to the Elementary Principal and reimburse those employes for amounts they were charged for their hot lunches, with interest, retroactive to the start of the 1988-1989 school year.

7/ The applicable interest rate set forth in Sec. 814.04(4), Stats., at the time this complaint was filed was twelve percent (12%) per year.

2.WE WILL NOT commit unlawful unilateral changes in the free hot lunch benefit provided to the employes in the bargaining unit represented by Local 1401-A, AFSCME, AFL-CIO.

3.WE WILL immediately reimburse employes in the bargaining unit represented by Local 1401-A, AFSCME, AFL-CIO, for amounts they paid toward group health insurance in excess of the amount they would have paid if the District had paid the equivalent of eighty-five percent (85%) toward the monthly premium for the family plan and the equivalent of one hundred percent (100%) toward the monthly premium for the single plan for the 1988-1989 contract year (July 1, 1988 - June 30, 1989), plus interest.

4.WE WILL stand as the provider of the disability insurance coverage set forth in Article 12, Section 12.05 - Disability Insurance, in our 1988-1991 Collective Bargaining Agreement with Local 1401-A, AFSCME, AFL-CIO, for the period starting January 1, 1989 through September 30, 1989.

5.WE WILL NOT in any other or related manner interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

_____
Superintendent, Wisconsin Dells School District

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

WISCONSIN DELLS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its amended complaint the Complainant asserts that the Respondent has committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5, Stats., by its conduct in the negotiations and mediation leading to the parties' initial Agreement, as well as its conduct after the Agreement was ratified.

In its answer the Respondent conceded that it had taken some of the actions alleged, but denied it had committed any prohibited practices.

POSITIONS OF THE PARTIES

Complainant

With regard to the practice of providing the free lunch benefit, the Complainant takes the position that the Respondent's unilateral discontinuance of that practice constitutes a failure to bargain. The Complainant cites Commission case law, as well as federal case law, for the proposition that an employer's unilateral discontinuance of an established condition of employment pending negotiations of a collective bargaining agreement, per se constitutes an unlawful failure to bargain. It is asserted that in this case there is no dispute that the Respondent changed a previously established condition of employment during the negotiations of an initial bargaining agreement without bargaining that change with the Complainant. There is also no dispute that the benefit has not been restored and that the Respondent has continued to reject

any discussions regarding restoring the benefit. In its reply brief, the Complainant contends that the Respondent has not denied the charges but rather raised the defenses of "business necessity" and "waiver." It is asserted that there is no evidence in the record to substantiate the Respondent's claim of a compelling need to discontinue the meal benefit. The record indicates that the auditor only suggested that the Respondent "consider" discontinuing the benefit, and that falls far short of establishing a present and compelling need. Moreover, even if such a need had been established, the benefit is a mandatory subject of bargaining that could not be lawfully changed without bargaining with the Complainant. Concerning waiver, the Complainant asserts that there is no evidence in the record to support the contention that it did not demand to bargain over the matter or that the grievance filed as to the free lunch was not presented until after the Agreement had been ratified. The only evidence in the record regarding the grievance indicates that by mid-December of 1988 it was at the step in the grievance procedure where it was to be considered by the Board and that it is being held in abeyance pending the outcome of this complaint. Complainant also notes that there was no contract to be grieved and no grievance procedure until the parties' Agreement had been ratified. Also, the Agreement provides for a period of 25 school days for the filing of a grievance. Hence, even if the grievance could have been filed before the Agreement was ratified, there is no evidence that such a grievance was untimely filed in this case. Regarding an assertion that the Complainant did not demand to bargain over the discontinuation of the free lunch benefit, Complainant asserts that the evidence contradicts that contention. The uncontroverted testimony of Rodenstein is that he confronted Monson and Peterson during a bargaining session regarding the discontinuation of the meal benefit and that they assured him that they did not intend to change any existing condition of employment without first bargaining it with Complainant and that they agreed to restore the benefit. In that regard, Complainant asserts that Peterson's failure to recall the conversation does not constitute a denial or rebuttal of Rodenstein's testimony on the point. The Complainant also asserts, in the alternative, that if the conversation between Rodenstein, Monson and Peterson constituted "bargaining" on the part of the Respondent, the Respondent must still be found to have violated the Agreement by refusing to restore the benefit. Complainant concludes that by such actions the Respondent has violated Secs. 111.70(3)(a)1, 4 and/or 5, Stats.

With regard to the Respondent's refusal to pay 85% and 100% of the employes' health insurance premiums for the family and single plans, respectively, and its failure to implement the agreed-upon disability income continuation insurance until just prior to hearing, it is alleged those actions constitute breaches of a collective bargaining agreement in violation of Secs. 111.70(3)(a)1 and 5, Stats. Complainant asserts that the bargaining history and testimony presented unequivocally establish that the dollar amounts referenced in the group health insurance provision represent the Respondent's unqualified agreement to pay 100% and 85% of the employes' health insurance premiums for the single and family plans, respectively. There is no testimony offered from the Respondent regarding any contrary intention. The Respondent's failure to pay the appropriate amounts for the premiums constitutes a breach of the parties' Agreement. It is asserted that there is also no dispute that the Respondent agreed to implement a disability income continuation insurance program for the employes, that no conditions whatsoever were attached to the immediate implementation of that program, that the terms and conditions of the program were spelled out in the parties' Agreement and that the Respondent failed to implement the agreed-upon program. This also constitutes a breach of the parties' agreement in violation of Secs. 111.70(3)(a)1 and 5, Stats.

In its reply brief, the Complainant notes the Respondent's defense that the language of the Agreement is clear as to the amount that the Respondent was to pay towards health insurance, and that if those numbers were unacceptable, the Complainant should have brought the issue to the bargaining table or not ratified the agreement. The Complainant asserts that the uncontroverted evidence is that at the bargaining table the parties agreed that the reference to the dollar amounts reflected the intention that the Respondent pay 100% and 85% of the single and family premiums, respectively. That is not only borne out by the uncontroverted testimony, but also by the reference to those same percentages set out in the contract for the subsequent years for which the dollar amounts were not known at the time. With regard to the disability income continuation insurance, Complainant asserts that the Respondent's defense that the delay in implementing the program was unintentional and the result of physical impossibility is without merit. It is asserted that the terms and conditions of the program were unconditionally spelled out in the Agreement and that neither the Respondent's intention, nor its belated efforts to locate a carrier to underwrite the program, are legally material or relevant. Respondent was obliged by the Agreement to meet the terms and conditions of the program it had agreed to provide, acting as a self-insurer, if necessary. Further, the delay in finding a carrier to underwrite the program was the result of the Respondent's own careless delay in finding a carrier and cannot excuse its failure to meet its contractual obligation. Further, the fact that the Respondent was able to find such a carrier disproves its physical impossibility defense.

The Complainant next asserts that besides unilaterally changing conditions of employment and breaching the parties' Agreement, the Respondent

"engaged in a pattern of reneging on tentative agreements previously made at the bargaining table . . . and otherwise regressive bargaining." Complainant contends that such conduct, when coupled with its other unlawful actions, independently constitutes a failure to bargain in violation of Secs. 111.70(3)(a)1 and 4, Stats.

As relief, the Complainant asserts that the Respondent should be ordered to restore the free meal benefit retroactively to when it was discontinued and make the affected employes whole, with interest. Similarly, Respondent should be ordered to reimburse the employes the difference between the amount the Respondent should have paid towards the group health insurance premiums, i.e., 100% and 85% for the single and family plans, respectively, and the amount it did pay, with interest. With regard to the disability income continuation insurance program, Respondent should be ordered to stand as a self-insurer to cover any employes who would have been eligible for the benefits provided in that plan, but for the Respondent's "dilatory conduct." In particular, Respondent should be ordered to provide the agreed-upon benefits to the employe Beverly Gamble. Further, Respondent should be ordered to cease and desist from unilaterally changing wages, hours and conditions of employment of bargaining unit employes in the future and from breaching its collective bargaining agreement with the Complainant. Complainant contends that given the "particularly flagrant violations" that have occurred, coupled with the Respondent's having "essentially admitted the charges" by untimely filing its answer and having failed to present any evidence to dispute the charges, the Respondent has failed to raise any "substantial issue or to present any colorable claim" in its defense and, therefore, should be ordered to pay actual, reasonable costs and attorneys fees incurred by the Complainant.

Respondent

With regard to an alleged violation of Sec. 111.70(3)(a)1, Stats., the Respondent asserts that the allegation is that the violation occurred as a result of the Respondent's announcing its intention to discontinue the free lunch benefit and subsequently terminating the program. The Respondent cites Commission case law as holding that in order to prevail on a complaint of interference under MERA, the Complainant must demonstrate by "a clear and satisfactory preponderance of the evidence" that the actions complained of were likely to interfere with employe rights and that although a finding of intent is not necessary to find interference, it must be demonstrated that the act complained of contains a "threat of reprisal or promise of benefit" which would tend to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats. Citing, Lisbon-Pewaukee Joint School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Brown County, Dec. No. 17258-A (Houlihan, 8/80). The Respondent also cites the Commission's decision in Milwaukee Public Schools, Dec. No. 20005-B (WERC, 2/84) where the Commission held with regard to alleged interference, "MERA was not enacted to grant the WERC an unlimited authority to generally oversee an employer's employment relations decisions." The Respondent denies that its actions interfered, restrained or coerced the employes in the exercise of their rights as municipal employes.

The Respondent asserts that as to an alleged violation of Sec. 111.70(3)(a)4, Stats., there cannot be a refusal to bargain when there has been no demand to bargain. It asserts that the record is clear that there was no demand to bargain in this case, nor was there ever a refusal to bargain by the Respondent at any time. The issue apparently arose in the eyes of the Complainant when the Respondent advised the cooks that the free lunch was being discontinued as a means to ameliorate the deficit being created in the food service department. According to the Respondent, its decision was based on "obvious business analysis and business conclusion" and this constitutes the defense of "business necessity". The Respondent also asserts that after becoming aware of the Respondent's intention to discontinue the benefit, the Complainant failed to demand to bargain over the issue. According to Respondent, this constitutes the defense of "waiver". The Respondent cites Commission decisions regarding the need to maintain the status quo and holding that determinations in that regard are made on a case-by-case basis after examining the parties' contract language, past practice and bargaining history. The Respondent also cites the Commissions's decision in Milwaukee Board of School Directors, Dec. No. 15197-B, 15203-A, (Yaeger, 12/81) as holding that the duty to bargain requires the parties to meet and confer at reasonable times and that undue delays between bargaining sessions may also violate the duty to bargain, but such delays do not constitute a per se violation as they may be excused by a showing of good faith or sound business reasons. It is asserted that the Complainant eventually filed a grievance in this matter, but that it did not do so until after the parties had ratified their agreement. Respondent alleges that the Board ratified the agreement in December of 1988 and that the initial notice of its intent to end the free lunch program was in August of 1988. There is no evidence to explain why the Complainant never brought the issue to the bargaining table during that time.

As to the alleged breach of contract violations, the Respondent first asserts that it received the estimate for the single and family group health insurance premium costs from the WEAIT representative as of March 14, 1988 and utilized those estimated amounts in computing the 85% and 100% figures that

were included in the labor agreement ratified by both parties. It asserts that the final figures were received by the Respondent on August 29, 1988 with an effective date of coverage of October 1, 1988, and asserts that since the premiums are paid the month immediately prior to the month for which the coverage is in effect, September 1988 in this case, the employees were aware of any payroll deductions which were necessary. The Respondent compares the amounts included in the parties' agreement with 100% and 85% of the actual premium costs, and asserts that while they are not the same, the express language of the agreement speaks for itself and asserts that if the Complainant found those numbers unacceptable, they should have raised the issue at the bargaining table or not ratified the agreement. With regard to the disability income continuation insurance, the Respondent asserts that both parties ratified this provision based on the belief that the Respondent would be able to obtain the same coverage as it provided for its teachers; however, WEAIT informed Respondent that it could not obtain the same coverage as was provided the teachers. Peterson informed the Complainant of this and immediately began a search for another carrier. Rodenstein advised Peterson that "we would give them some latitude, but that he needed to do this as soon as possible." Rodenstein told that to Peterson in January or February and it was some months before the Respondent was able to arrange the coverage, however, while Complainant claims coverage should have been provided sooner, it has never specified how much sooner. The Respondent asserts as a defense that the conditions under which the parties reached agreement on disability income continuation insurance changed through the fault of neither party. The Respondent informed the Complainant of the progress in the search for a carrier and encouraged Rodenstein to contact the WEAIT representative to help expedite matters. The Respondent asserts that it "worked diligently in trying to find disability insurance and it was only because of the literal unavailability of such coverage for a period of time that it took as long as it did to obtain the coverage." Hence, it was not the intentional conduct of the Respondent that caused the delay in implementing the disability insurance, rather, it was a matter of the physical impossibility of obtaining such insurance.

With regard to the alleged violation of Sec. 111.70(3)(a)4, Stats., based on Respondent's June 2, 1988 proposal, the Respondent asserts that the evidence does not support a finding of bad faith bargaining on the part of the Respondent. It asserts that the May 16, 1988 proposal from Respondent was the result of a meeting of certain Board members and the June 2, 1988 proposal was the result of a meeting of different Board members, with the latter meeting resulting in the earlier proposal being overturned. Respondent asserts that this is "a completely legitimate exercise of school board authority." It is also contended that since the Complainant did not communicate in any form with Respondent after receiving the May 16, 1988 proposal, there were no tentative agreements known to be reached as a result of that proposal. Further, before any tentative agreements were reached, the Respondent's June 2, 1988 proposal was issued which rendered the earlier proposal "null and void." Since no agreements were reached based on the May 16, 1988 proposal, the Complainant was not prejudiced by the proposal being rendered null and void. According to the Respondent, the "totality of conduct" theory also does not support a finding of bad faith bargaining.

DISCUSSION

Discontinuation of the Free Hot Lunch Practice

The evidence in the record establishes that there had been a long standing practice in the Respondent District that the cooks and one of the secretaries did not have to pay for their hot lunch when working. That practice was unilaterally discontinued by the Respondent at the start of its 1988-1989 school year while the parties were engaged in the mediation process for their initial collective bargaining agreement. The evidence indicates that the Respondent gave the affected cooks notice that the free lunch benefit was being dis-continued, but that it did not directly notify the Complainant and did not offer to bargain regarding the decision or its impact. There is no contention that the decision to discontinue the free lunch benefit is not a mandatory subject of bargaining. The benefit was both a form of compensation and a condition of employment and as such would fall within the meaning of the term "wages, hours and conditions of employment" as that term is used in Sec. 111.70(1)(a), Stats.

Section 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer "to refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . ." For a municipal employer to unilaterally alter the status quo of a benefit that is a mandatory subject of bargaining while the parties are engaged in negotiations on a collective bargaining agreement has been held to constitute a refusal to bargain within the meaning of Sec. 111.70(3)(a)4, Stats. Manitowoc Public School District, Dec. No. 24205-A (Schiavoni, 10/87); aff'd Dec. No. 24205-B (WERC, 3/88); aff'd Manitowoc Co. CirCt; Mid-State V.T.A.E., Dec. No. 14958-B,C (Yaeger, 5/77). The Respondent has raised the defense of business necessity; however, the only evidence offered in that regard is that elimination of the benefit would reduce the Respondent's costs. While the Respondent's efforts to reduce its food program costs is understandable in light of its running a deficit in that program, an

attempt to save money does not constitute a "business necessity" such that it would relieve the Respondent of its duty to bargain.

The Respondent also has asserted that by agreeing to, and ratifying, a contract that does not include any provision for a free hot lunch benefit, when it was made aware during bargaining that the benefit had been discontinued, the Complainant waived its right to bargain over the benefit. The Complainant, in turn, has asserted it relied on the assurances of the Respondent's representatives during mediation that the practice of providing the free lunch benefit would be restored so that it was unnecessary to bargain a specific provision regarding the benefit into the parties' Agreement.

In a recent decision the Commission held that in order for a union to prevail on a claim of bad faith bargaining based upon an employer's failure to follow through on assurances given during bargaining, the union must establish through "competent evidence of record" that the employer gave "direct or implied . . . assurances" to the union during bargaining. 8/ In this case there is Rodentstein's testimony that he received assurances directly from Monson and Peterson during a mediation session that the free hot lunch benefit would be reinstated, coupled with the testimony of DuPlayee and Kent that Rodenstein subsequently reported his conversation with Monson and Peterson to them conveying the latters' assurances that the benefit would be reinstated. Conversely, there is Peterson's testimony that he does not recall such a conversation with the mediator; however, Peterson also testified that he does not recall whether the subject of the free lunch was ever brought up by either party during the negotiations leading to the parties' Agreement. Based upon that testimony it is concluded that in reaching agreement on, and ratifying, the parties' initial Agreement without bargaining a specific provision for the free lunch benefit, the Complainant relied upon the assurances of Respondent's representatives that the practice of providing the benefit would be reinstated. It is determined that, under those circumstances, reaching agreement on a contract without a specific provision for the free hot lunch did not constitute a waiver of the Complainant's right to bargain over that matter. Moreover, by continuing to refuse to reinstate the pre-existing practice after the Respondent's representatives had agreed during mediation to do so 9/ and after the parties had ratified their Agreement, the Respondent is deemed to have violated Sec. 111.70(3)(a)5, Stats.

The appropriate relief in a case where the municipal employer has unilaterally changed existing wages, hours or conditions of employment is to order a return to the status quo ante 10/ and, hence, the Respondent has been ordered to reinstate the free hot lunch benefit for the affected employes and to make them whole for the costs they incurred due to the Respondent's violation retroactive to the start of the 1988-89 school year. As it has also been concluded that the parties reached agreement that the free hot lunch benefit would be reinstated and continued, it has been further ordered that the benefit is to continue as an existing practice.

Health Insurance Premiums

The Complainant has alleged that the Respondent has violated the parties' Agreement by not paying the equivalent of 85% toward the monthly premium for the family health insurance plan and the equivalent of 100% of the monthly premium for the single plan for 1988-1989, 11/ as the parties intended. 12/ The Respondent defends on the basis that the Agreement contains express dollar amounts and that if the Complainant found those to be unacceptable, it should have raised the issue at the bargaining table. While the Respondent's argument in this regard would normally be persuasive, in this case the evidence

---

5/ Racine Unified School District, Dec. No. 25283-B (WERC, 5/89), at 7.

6/ It is noted that Peterson apparently had the authority to fully represent the Respondent in that regard as he testified he had made the decision to discontinue the practice on his own. Further, Peterson's response to DuPlayee and the others that the Respondent intended to comply with the remedy sought by their grievance indicated a belief on his part that it had been agreed that the free lunch benefit would be reinstated. It was at the meeting of the Respondent's Board where the grievance was denied that the Complainant restated its demand to bargain over the matter.

7/ Oconomowoc Plumbing, Inc., Dec. No. 20214-B (WERC, 3/84); Mid-State V.T.A.E., Dec. No. 14958-B,C (Yaeger, 5/77); aff'd Dec. No. 14958-D (WERC, 4/78).

8/ The parties' Agreement contains a "side bar" that the Respondent will pay the dollar equivalent of 85% of the family plan premium at 100% of the single plan for 1989-90 and 1990-91.

9/ Although the parties' Agreement contains a provision for final and binding grievance arbitration, neither party has taken the position that the Examiner should not assert the Commission's jurisdiction over the alleged Sec. 111.70(3)(a)5, Stats., violations.

establishes that those dollar amounts do not reflect the parties' intent. The record indicates that: (1) The Respondent's representatives initially proposed to pay 85% of the premium for the family plan and 100% of the premium for the single plan and subsequently proposed the dollar amounts in Article 12.01, indicating to the members of Complainant's bargaining team that those amounts reflected the 85% and 100% of the monthly family plan premium and single plan premium, respectively; (2) the Respondent's representatives were aware that the dollar amounts they proposed were only based on an estimate of what the premiums would be, but failed to convey that to Complainant's representatives; and (3) the Respondent was subsequently informed in August of 1988 as to what the actual premiums would be effective October of 1988 and failed to advise Complainant of those amounts. While there is no evidence that this was other than an oversight on Respondent's part, there is also no evidence in the record to indicate that the Complainant was informed that the premium amounts were in fact different from what its representatives had been told or that the dollar amounts Respondent had proposed in fact no longer represented 85% and 100% of the monthly premiums for the family plan and single plan, respectively. Also, the "side agreement" attached to the parties' initial Agreement further reflects their intent that the Respondent pay the equivalent 85% of the monthly premium for the family plan and 100% of the monthly premium for the single plan.

Under such circumstances it is appropriate to go beyond the express terms of the Agreement and consider parol evidence, such as the bargaining history, to determine whether those terms correctly express the parties' intended agreement. 13/ Based upon the evidence in that regard, the Examiner concludes that the mutual intent of the parties was to agree on dollar amounts the Respondent would pay that reflected 85% of the premium for the family plan and 100% of the premium for the single plan and that the dollar amounts were not changed when the actual premium amounts became known during the bargaining/mediation process leading up to the parties' Agreement. Therefore, by refusing to pay the equivalent of 85% of the monthly premium for the family plan and 100% of the premium for the single plan, for the 1988-89 contract year, the Respondent violated Section 12.01 of the parties' Agreement and thereby violated Sec. 111.70(3)(a)5, Stats.

It is also appropriate under such circumstances as are present here to reform the agreement to correctly express the parties' intent. The Wisconsin Supreme Court has held that reformation is available as relief under the following circumstances:

> . . . While mutual mistake, or mistake by one party and fraud by another are recognized as bases for the relief of reformation of an instrument, Findorff v. Findorff (1957), 3 Wis. 2d 215, 224, 88 N.W. 2d 327, the fraud or inequitable conduct entitling such relief must exist at the time of execution of the instrument, not in some subsequent and distinct transaction. 66 Am. Jur. 2d, Reformation of Instruments, sec. 24 (1973). It is the failure of the instrument to express "at the time of the execution" the intent of one party and that same intent known by the other party who also knows the error in the instrument that justifies reformation. Restatement (Second) Contract, sec. 505. 14/

Since the 1988-1989 contract year has passed actual reformation is not required; however, the order that the Respondent make the affected employes whole retroactively for the difference between what the Respondent paid, and what it should have paid towards the group health insurance premiums, is in this case the practical equivalent.

Disability Insurance

The Complainant has alleged that the Respondent violated Section 12.05 of the parties' Agreement by failing to implement the agreed upon disability insurance plan until October of 1989. The Respondent does not dispute that it failed to implement the agreed upon disability insurance plan after the parties ratified their Agreement in December of 1988, rather, it asserts that in spite of its good faith attempt to implement the plan, it was unable to do so due to the unavailability of a carrier that would provide such a plan. The record evidence establishes that both parties proposed the same plan contained in Respondent's collective bargaining agreement covering its teaching staff and assumed in good faith that such a plan was available for the employes represented by Complainant. The evidence also indicates that when Peterson was

---

10/ Elkouri and Elkouri, How Arbitration Works (3rd ed.) at 363., See also In re Spring Valley Meats, Inc.; Dairyland Equipment Leasing, Inc. v. Bohren, 94 Wis. 2d 600, 607 (1990).

11/ Milwaukee v. Milwaukee Civic Developments, Inc., 71 Wis. 2d 647, 653 (1976).

told by the WEAIT representative, Antonie, that WEAIT would not provide the same disability insurance plan for Respondent's support staff employes that it provided for Respondent's teaching staff, Peterson contacted the Complainant's president and Rodenstein to advise them of the problem. Rodenstein testified that when contacted he advised Peterson that the Complainant "would give them some latitude", but that he (Peterson) needed to obtain the coverage as soon as possible. The Respondent eventually received bids for the agreed upon coverage from WEAIT and General Casualty, the bid from WEAIT being received on June 8, 1989 and coverage from the carrier implemented effective October 1, 1989. The Respondent asserts that the delay in providing coverage was unintentional and that it was due to "the physical impossibility of obtaining such insurance."

The Respondent's good faith assumption and its subsequent efforts to obtain a carrier to provide the coverage aside, the Respondent agreed to a provision in the parties' Agreement whereby it assumed the responsibility of providing its support staff employes with the option of being covered by group long term disability insurance. There was no condition or qualification placed on that responsibility and the burden was on the Respondent to make sure such a plan would be available after the parties' Agreement was ratified. Simply put, the burden was on the Respondent to check with WEAIT to make sure the parties' assumption that the coverage was available for non-teaching staff was correct. It was the Respondent's failure to contact WEAIT in that regard until after the Agreement had been ratified that for the most part created the problem with obtaining the coverage in a timely manner.

Both the U.S. Supreme Court and the Wisconsin Supreme Court have concluded that "impossibility" as a defense to a breach of contract claim is generally not available under such circumstances as are present in this case. In N. R. Grace & Company v. Rubber Workers Local 759 15/ the employer had entered into a conciliation agreement with the Equal Employment Opportunity Commission, the terms of which conflicted with the seniority provisions in the employer's collective bargaining agreement with the union, and then the employer sought and obtained an order from a federal district court which held that the terms of the conciliation agreement were binding on all parties. The employer then effected layoffs in accord with the conciliation agreement. An arbitrator subsequently held that the employer had violated the collective bargaining agreement by the layoffs. In addressing possible ways the arbitrator (Barrett) could have found for the employer, the Court noted:

> Although Barrett could have considered the District Court order to cause impossibility of performance and thus to be a defense to the Company's breach, he did not do so. Impossibility is a doctrine of contract interpretation. See 18 W. Jaeger, Williston on Contracts Sections 1931-1979 (3rd ed. 1978). For the reasons stated in the text, we cannot revise Barrett's implicit rejection of the impossibility defense. Even if we were to review the issue de novo, moreover, it is far from clear that the defense is available to the Company, whose own actions created the condition of impossibility. See id., section 1939, p. 50; Uniform Commercial Code section 2-615(a) and comment 10, 1A U.L.A.

113 LRRM 2645 at Note 10. In Estate of Zellmer, 1 Wis.2d 46 (1957) the Wisconsin Supreme Court addressed the impossibility defense in a breach of contract action and held:

> To interpret the instant contract as containing a promise by Dr. Zellmer that the policy in question was in force and effect at the time of entering into the stipulation is to invoke a legal fiction. This is because there is nothing in the record to indicate that such was his intention. We doubt the policy of invoking such fiction in order to impose liability on a promisor who, due to mistake, has innocently and without fault undertaken to perform the impossible. Therefore, we prefer to ground our decision in the instant case squarely upon the principle enunciated in Restatement, 2 Contracts, p. 847, sec. 456, supra. A promisor should not be excused from responding in damages for breach of contract on the ground of impossibility of performance due to mistake in a situation, where due to his own negligence, he had failed to discover at the time of entering into the contract the non-existence of the fact or thing which made performance by him impossible. It is on this basis that we determine that Dr. Zellmer's estate must be held liable to the claimant.

1 Wis.2d at 51. Even assuming arguendo that it was in fact impossible for the

---

12/ 103 S. Ct. 2177, 113 LRRM 2641 (1983).

Respondent to obtain the coverage any sooner, 16/ application of the foregoing case law results in a conclusion that the defense of impossibility is not available under the circumstances in this case.

Part of the remedy sought by the Complainant is an order that the Respondent stand as a "self-insurer" to cover any employes who would have been eligible for the disability benefits provided for in Section 12.05 of the Agreement, but for the Respondent's conduct. Such relief is appropriate as part of a general make whole remedy and has been ordered. The Complainant also requests that, in particular, the Respondent be ordered to provide Beverly Gamble, a former custodian, with disability insurance benefits. The only evidence presented in that regard, albeit unrebutted, is the testimony of Complainant's President, Kent, that Gamble had her hand slammed in a door at the High School and subsequently had carpal tunnel surgery on that hand, and later on the other hand, and that "she was forced to quit her job" because "she can't do custodial work at all." That is not sufficient evidence upon which to conclude as a fact that Gamble was "disabled" within the meaning of the eligibility requirements of the disability insurance plan, assuming that Gamble would have opted to be covered by the disability insurance. 17/ That matter can be resolved through the parties' contractual grievance and arbitration procedure, it having now been held that the Respondent stood as the insurer until it obtained the agreed upon coverage through WEAIT.

Respondent's June 2, 1988 Proposal

The record establishes that the Respondent sent the Complainant a proposal dated May 16, 1988 that contained a number of provisions that were essentially the same or similar to provisions Complainant had proposed, as well as a number of provisions that indicated movement towards the Complainant's position, that the Complainant did not respond to Respondent's May 16th proposal before it received another proposal from the Respondent dated June 2, 1988, and that the Respondent's June 2nd proposal contained changes from it May 16th proposal which in a number of areas indicated movement away from the Complainant's position, including areas where the parties' proposals had been the same.

13/ It is noted that the cost of obtaining the coverage from a different carrier or from the first carrier to offer it is irrelevant with regard to the impossibility defense. See W.R. Grace & Co., 113 LRRM 2646, note 12, and the citations therein.

14/ It is noted that Section 12.05 provides that "Employees shall have the option to be covered by group long-term disability insurance. . ."

While the Complainant asserts that the above conduct amounts to reneging on tentative agreements, the evidence does not support that charge. There was no indication in the Respondent's May 16th proposal or accompanying cover letter that it was willing to tentatively agree to provisions separately, and the cover letter expressly stated that "The school board reserves the right to amend, add to, delete or otherwise change any of the above." Most significantly, the Complainant did not make any response to the May 16th proposal to indicate that it either accepted or rejected any parts of that proposal. Hence, there were no tentative agreements reached on the basis of the Respondent's May 16th proposal prior to Respondent making its June 2, 1988 proposal which, among other things, nullified the May 16th proposal. It is further noted that a number of the allegedly negative changes included in the June 2nd proposal were eventually agreed to and included in the parties' Agreement in the same or similar form, e.g., the six month probationary period for new hires, the loss of seniority in the event the employe does not return to work within three work days after the expiration of a leave of absence or is absent three or more work days without notifying the Respondent, 18/ no pyramiding of overtime, etc. Although the Respondent's June 2, 1988 proposal might have represented a step backwards in the eyes of the Complainant, it did not constitute bargaining in bad faith within the meaning of Sec. 111.70(3)(a)4, Stats.

Remedy

Besides requesting a cease and desist order and make whole relief, the Complainant also asks that it be awarded costs and attorneys fees. The Commission has held that such relief is available "only where a litigant's position demonstrates extraordinary bad faith." 19/ The Respondent has successfully defended against one of the charges, and while the Respondent's conduct certainly has contributed to a lack of trust in its relationship and dealings with the Complainant, it does not rise to the level of "extraordinary bad faith" so as to merit the award of costs and attorneys fees. Therefore, it has been concluded that the cease and desist order and the affirmative relief order will adequately remedy the violations found to have been committed by the Respondent.

Dated at Madison, Wisconsin this 5th day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

15/ It is noted that these provisions for the loss of seniority could be considered more favorable to the Complainant than those in the May 16th proposal.

16/ Hayward Community School District, Dec. No. 24259-B (WERC, 3/88),at page 5.