STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. ST. CROIX FALLS SCHOOL DISTRICT, Respondent.	Case 31 No. 46214 MP-2516 Decision No. 27215-D

Appearances:
Ms. Chris Galinat, Associate Counsel, and Mr. Anthony L. Sheehan, Staff Counse
Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow, Suite

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

On January 19, 1993, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order 3/ in the above matter wherein she concluded that Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. by altering the status quo as to sick leave benefits during a contract hiatus. In her decision, she also dismissed alleged prohibited practices related to creation of a new secretarial position and reassignment of duties.

Respondent timely filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. seeking review of the Examiner's determination that Respondent had committed prohibited practices. The parties thereafter filed written argument, the last of which was received May 4, 1993.

Having reviewed the record, the Examiner's decision and the parties' positions on review, the Commission makes and issues the following

ORDER 2/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

3/ On January 25, 1993, Examiner Burns issued Corrected Findings of Fact, Conclusions of Law and Order to rectify a printing error in her Conclusion of Law 7.

William K. Strycker /s/
William K. Strycker, Commissioner

2/ 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 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.

(Footnote 2/ continues on the next page.)

(Footnote 2/ continues from the previous page.)

> 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.
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> (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.
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> (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.

SAINT CROIX FALLS SCHOOL DISTRICT

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

The Pleadings

The initial complaint filed by Complainant Northwest United Educators alleged that Respondent St. Croix Falls School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, 3 and 4, Stats.,

by unilaterally changing the hours and compensation of clerical employes represented by Complainant. The complaint was subsequently amended to allege Respondent had violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by unilaterally changing conditions of employment of bargaining unit employes.

Respondent filed answers denying that it had committed any of the alleged prohibited practices and also moved that the allegations raised by the amended complaint should be deferred to grievance arbitration.

The Examiner's Decision

In Decision No. 27215-A (Burns, 9/92), the Examiner denied Respondent's deferral motion concluding deferral was not appropriate because no contractual grievance arbitration existed at the time of the alleged unilateral change and Complainant had not otherwise agreed to proceed to grievance arbitration.

In Decision No. 27215-B (Burns, 1/93), the Examiner concluded that Respondent improperly modified the status quo as to sick leave when it began requiring employes to use sick leave in half-day increments. She reasoned:

> The memo of January 2, 1992 was issued during a hiatus period between collective bargaining agreements. As discussed above, during such a hiatus period, and absent a valid defense, an employer's unilateral change in the status quo on matters which primarily relate to wages, hours, or conditions of employment is a per se violation of Sec. 111.70(3)(a)4, Stats. The Commission has recognized necessity to be a valid defense to the allegation that an employer has violated its statutory duty to bargain. 4/ The Commission has also recognized the defense of waiver. It is well established, however, that a waiver of the right to bargain on mandatory subjects of bargaining must be clear and unmistakable, and that a finding of such waiver must be based on specific language in the agreement or bargaining history. 5/
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> Sick leave is primarily related to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining. 6/ The undersigned is persuaded that the decision to require bargaining unit employes to use sick leave in one-half day minimums is primarily related to the wages, hours and working conditions of Complainant's bargaining unit employes and, therefore, is a mandatory subject of bargaining. Thus, absent a valid defense, the District did have the statutory obligation to maintain the status quo on the sick leave policy during the contract hiatus period.
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> The Commission has found that the binding interest arbitration provisions of Sec. 111.70(4)(cm),

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4/ School District of Turtle Lake, Dec. No. 24686-A (Bielarczyk, 2/88); Green County, Dec. No. 20308-B (WERC, 11/84); and City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

5/ City of Appleton (Police Department), Dec. No. 14615-C (WERC, 1/78).

6/ Sauk County, Dec. No. 17657-C (McGilligan, 3/81).

Stats., make inappropriate an application of the private sector impasse defense principles to disputes subject to the statutory interest arbitration process and has concluded that, in negotiations subject to compulsory final and binding interest arbitration under Sec. 111.70(4)(cm), Stats., impasse, however defined, is not a valid defense to a unilateral change in a mandatory subject of bargaining. 7/ The sick leave change occurred during the contract hiatus period and immediately prior to the time that the parties commenced negotiation on the successor agreement. Thus, the dispute over the sick leave change was subject to the interest arbitration procedure. Despite the District's argument to the contrary, the defense of impasse is not available to the District in the present case.

Having concluded that there was a duty to maintain the status quo on the sick leave policy, it becomes necessary to identify the status quo. As discussed above, when determining the status quo within the context of a contract hiatus period, the Commission considers relevant language from the expired contract, as historically applied, or as clarified by bargaining history.

In the present case, the expired agreement is the parties' initial agreement, the terms and conditions of which were determined by an interest arbitration award which was issued on November 4, 1991. Since this initial agrement was, by its terms, effective from February 14, 1989 through June 30, 1991, and there was no agreement to extend the term of the initial agreement, the agreement was expired at the time that the parties received the interest arbitration award. There is, therefore, no evidence of historical application of the contract language.

As the District argues, the expired initial collective bargaining agreement contains a Management Rights Clause which provides the District with various rights to manage school operations, including the right to establish reasonable work rules. The expired collective bargaining agreement also contains the following:

> This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supersedes all previous agreements between the parties. Any supplemental amendments to this Agreement or past practices shall not be binding on either party unless executed in writing by the parties hereto. Waiver or any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

7/City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

Assuming arguendo, that the change in the sick leave policy is a work rule, it is well established that a work rule which primarily relates to mandatory subjects of bargaining is a mandatory subject of bargaining. 8/ Contrary to the argument of the District, neither the language of the Management Rights Clause, nor any other language of the expired initial agreement, served as a waiver of NUE's right to bargain changes in the sick leave policy during the contract hiatus period which followed the expiration of the initial agreement. Nor did the language of the expired initial agreement create a dynamic status quo such that the District had the right to unilaterally change the sick leave policy during the contract hiatus period which followed the expiration of the initial collective bargaining agreement.

The sick leave language contained in the expired initial collective bargaining agreement does not mandate that sick leave be used in increments of one hour, nor does it mandate that sick leave be used in minimums of one-half day. Rather, the sick leave language is silent with respect to this aspect of sick leave usage.

At the time that the parties negotiated the initial collective bargaining agreement, Complainant's bargaining unit members were permitted to use sick leave in hour increments. If an employe became ill at work and left work early, the employe was charged only for the time lost. The record does not demonstrate that, at the time that the parties negotiated the sick leave language contained in the initial collective bargaining agreement, the District advised NUE that it would administer the contractual sick leave in a manner which differed from the existing practice. Nor is it evident that, prior to the issuance of the January 2, 1992 memo, the District did administer the sick leave in a manner which was inconsistent with the prior practice.

The Examiner is satisfied that, on January 2, 1992, the status quo on sick leave usage was that employes were entitled to use sick leave in one hour increments and that, if an employe became ill at work, the employe was charged only for the time lost from work. The Examiner is further satisfied that the District Administrator's memo of January 2, 1992, which stated that "All leave requests will be granted in one-half day minimums" unilaterally changed the status quo with respect to the use of sick leave. 9/

In raising the business necessity defense, the District argues that the change in the sick leave

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8/City of Wauwatosa, Dec. No. 15917 (WERC, 11/77).

9/The District acknowledges, in its reply brief, that since the date of the issuance of the January 2, 1992 memo, NUE bargaining unit members have been charged sick leave in one-half day increments.

policy was necessary to obtain uniform contract administration. The record, however, indicates that, prior to the change in the sick leave policy, there was uniform administration of the sick leave policy, i.e., employes were entitled to use sick leave in one hour increments and, if an employe became ill at work, the employe was charged only for the time lost. 10/ While it may be that the change in the sick leave usage policy made it easier for the District's Bookkeeper to record sick leave usage, the ease of recording sick leave is not a "necessity" which justifies the District's unilateral change of the sick leave policy. Despite the District's argument to the contrary, the record does not establish a valid defense of "necessity".

At hearing, the District Administrator confirmed that he never consulted with any NUE Representative prior to issuing the January 2, 1992 memo. 11/ Within two weeks after the issuance of the memo of January 2, 1992, the parties met to exchange initial proposals on the agreement to succeed the expired initial agreement. As the District argues, the initial proposals presented by NUE do not address any aspect of sick leave. Nor is it evident that either NUE, or the District, made a bargaining proposal on any aspect of sick leave during the time that the parties negotiated a successor agreement. 12/

Waiver by inaction has been recognized as a valid defense to alleged refusals to bargain, including alleged unilateral changes in a mandatory subject, except where either the unilateral change amounts to a fait accompli or the circumstances otherwise indicate that the request to bargain would have been a futile gesture. 13/ The Examiner is persuaded that, in the present case, the District's unilateral change in the sick leave policy was a fait accompli. Despite the District's assertions to the contrary, NUE did not have a duty to bargain the maintenance of the status quo. 14/

10/T. at 21-22.

11/T. at 26.

12/At the time of hearing, the parties had submitted final offers on the terms and conditions to be included in this successor agreement and were awaiting the interest arbitration award on the successor agreement.

13/City of Appleton, Dec. No. 17034-C (McCrary, 1/80); Green Bay School District, Dec. No. 16753-A (Yaeger, 12/79); Walworth County, Dec. No. 15429-A, 15430-A (Gratz, 12/78).

14/Menomonee Falls School District, Dec. No. 20499-B (WERC, 10/85).

> In his letter of March 5, 1992, NUE Representative Manson indicated that, during the previous two months, the District and NUE had various communications on a variety of subjects, including "Leave Requests". The communications referred to in Manson's letter are "your memo of January 2, 1992" and "dialogue at the bargaining table on January 14 and February 6". The record does not establish the content of the "dialogue at the bargaining table". The record fails to establish that, during the negotiation of the successor agreement, NUE has waived its statutory duty to bargain over the change in the sick leave policy or that the District has complied with its statutory duty to bargain over the change in the sick leave policy.
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> In summary, the Examiner is satisfied that, when the District issued the memo of January 2, 1992, the District, without a valid defense, unilaterally changed a mandatory subject of bargaining. Accordingly, the Examiner has concluded that the District has violated Sec. 111.70(3)(a)4, Stats.
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> By violating Sec. 111.70(3)(a)4, Stats., the District has committed a derivative violation of Sec. 111.70(3)(a)1, Stats. The record, however, does not establish that the District's conduct in unilaterally changing the sick leave policy resulted in an independent violation of Sec. 111.70(3)(a)1, Stats. Nor does the record establish that this conduct of the District violated Sec. 111.70(3)(a)2 or Sec. 111.70(3)(a)3, Stats. In remedy of the District's unlawful unilateral change in the sick leave policy, the Examiner has issued a cease and desist order, has ordered the District to return to the status quo ante, and has ordered the District to make employes whole for all sick leave lost as a result of the unlawful unilateral change. Additionally, the Examiner has ordered the District to post the appropriate notice.

As to Complainant's contention that Respondent had violated its duty to bargain by altering clerical work assignments, the Examiner contended that Respondent's decision to reassign duties to a new position was a permissive subject of bargaining as to which Respondent had no duty to bargain. She further determined that Respondent's reassignment was not violative of Secs. 111.70(3)(a)1, 2 or 3, Stats.

DISCUSSION

On review, Respondent initially argues that the Examiner erred by failing to defer the sick leave issue to grievance arbitration. It asserts that: (1) the parties have utilized grievance arbitration to resolve other disputes which have arisen during the current contract hiatus; (2) the contract clearly addresses the Respondent's right to alter sick leave policies; and (3) the dispute does not involve important issues of law or policy. Thus, Respondent contends that the conditions necessary for deferral under existing Commission precedent are present herein.

Complainant asserts the Examiner properly refused to defer the sick leave dispute to arbitration inasmuch as no contractual grievance arbitration procedure existed at the time of the sick leave policy change.

We have affirmed the Examiner's refusal to defer the sick leave dispute.

She correctly concluded that deferral is inappropriate where no contractual grievance arbitration procedure existed at the time of the sick leave change and Complainant had not otherwise agreed to submit this contract hiatus dispute to grievance arbitration.

As revealed by Respondent's extensive discussion of Commission deferral policy, an essential premise underlying the propriety of deferral is allowing disputes to be resolved in a forum the parties have agreed should serve that function. 15/ Here, because no collective bargaining agreement was in effect at the time of the sick leave change, there was no generally available arbitration forum. Nor had the parties generally agreed to resolve hiatus disputes through arbitration. Lastly, Complainant has not agreed to resolve this specific dispute through arbitration. Absent agreement by the parties to an arbitration process, there is nothing to which the dispute can be deferred. Thus, even assuming arguendo deferral would otherwise be appropriate, it is not an available option.

Turning to the merits of the dispute, Respondent argues that its status quo rights are defined by the Management Rights provisions of the expired contract (specifically, Article IV, 4 and 8) which give Respondent the right to implement "policies" and "reasonable work rules". Respondent contends that the Management Rights clause constitutes an express waiver by Complainant of the right to bargain over reasonable work rules Respondent may establish, including the restriction on sick leave usage. Under the dynamic status quo, the Respondent asserts that during a contract hiatus, it is able to exercise the rights it "bought" at the bargaining table. Respondent argues that the Examiner's decision renders meaningless Respondent's negotiated right to adopt reasonable work rules and policies.

Complainant asserts the Examiner correctly concluded the Respondent breached the status quo when it changed the minimum sick leave increment from one hour to one-half day. Complainant argues the Management Rights clause is too broad to constitute a clear and unmistakable waiver and asserts there is no bargaining history which supports the Respondent's interpretation. Complainant contends that under the District's logic, any substantive change in a mandatory subject of bargaining could be accomplished through new employer rules. The Complainant argues such a result is inconsistent with an employer's bargaining obligations under the Municipal Employment Relations Act.

Both parties correctly view the status quo as a dynamic concept defined by the language of the expired agreement, the manner in which the language has been implemented, and any bargaining history related to the language. 16/ We turn to the task of applying these components to the record before us.

The sick leave language from the expired 1989-1991 contract (Article XIII - Leave of Absence) does not specify the increments of time in which sick leave can be utilized. However, the practice under the language prior to the Respondent's disputed change was to allow sick leave to be utilized in one hour

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15/ See Milwaukee Elks, Dec. No. 7753 (WERC, 10/66).

16/ Although both parties have also argued this case in terms of a clear and unmistakable waiver analysis, such an analysis is not particularly apt in a status quo case. A waiver analysis is more appropriately applied to the duty to bargain disputes which arise during the term of a contract. See Brown County, Dec. No. 20620 (WERC, 5/83); City of Appleton, Dec. No. 14615-C (WERC, 1/78). In status quo cases, the status quo is defined by language, practice and bargaining history and then measured against the employer's conduct. See Racine Unified School District, Dec. Nos. 26816-C, 26817-C (WERC, 3/93); Mayville School District, Dec. No. 25144-D (WERC, 5/92).

increments or, if the employe became ill during the workday, sick leave usage was measured by actual lost work time. The record contains no bargaining history as to the sick leave increment question.

Given the foregoing, we conclude that under the sick leave language of the contract, and the parties' sick leave practice, employes had a contractual right to use sick leave in accordance with existing practice. Because sick leave benefits are a mandatory subject of bargaining, this contractual right became a status quo right when the contract expired.

However, the Respondent asserts that the "policies" and "reasonable work rule" language in the Management Rights clause gives it the right to change the sick leave increment and the dynamic status quo allows it to exercise that right during a contract hiatus. If we were persuaded that the Management Rights clause authorized the increment change, Respondents' legal analysis would be correct. The status quo clearly can authorize change. However, we do not find Respondent's interpretation of the Management Rights clause language persuasive.

The Respondent's contractual rights to enact "policies" and establish "reasonable work rules" are contractually limited elsewhere in Article IV "by specific and express terms of this Agreement". Thus, assuming arguendo that the District Administrator's January 2, 1992 memo was an exercise of "policy" or "work rule" creation and further assuming that the memo as it relates to sick leave usage was "reasonable", the policy or work rule cannot conflict with or negate rights otherwise established by the contract. Here, we have concluded that employes had a contractual right to use sick leave in accordance with the practice which existed prior to the January 2, 1992 memo. Thus, to the extent any exercise of Article IV policy or work rule rights negates employes' contractual sick leave rights, such an exercise exceeds the Respondent's Article IV rights and therefore cannot be a valid basis for altering the status quo. Given the foregoing, we reject the Respondent's Management Rights clause-based argument.

Lastly, we turn to Respondent's argument that the sick leave increment change was not a fait accompli, but rather a matter as to which Respondent was willing to bargain.

The Examiner's conclusion that the change was a fait accompli is fully and persuasively supported by the record. Respondent simply implemented the change without notice to or prior discussion with Complainant.

Even more importantly, as the Examiner correctly held, the Complainant has no obligation to bargain with Respondent over changing the status quo in effect during a contract hiatus. Complainant is obligated to bargain over the sick leave increment issue for the term of the successor to the 1989-1991 contract. Respondent is entitled to try to retroactively change the existing increment structure. But during the contract hiatus, Complainant is entitled to enjoy the status quo and is not obligated to bargain over the loss of existing status quo protections. Thus, contrary to Respondent's theory, Complainant could not waive status quo rights by inaction. Complainant could choose to, but could not be obligated to, bargain over status quo sick leave increment issues.

Given all of the foregoing, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 27th day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/

A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner