STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of NEW LISBON SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Section 227.41, Wis. Stats., Involving a Dispute Between Said Petitioner and NEW LISBON EDUCATION ASSOCIATION	Case 26 No. 48453 DR(M)-511 Decision No. 27632

Appearances:
Mr. Barry Forbes, Staff Counsel, Wisconsin Association of School Boards, Inc.,
Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Counci

FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

On December 10, 1992, the New Lisbon School District filed a petition with the Wisconsin Employment Relations Commission requesting a declaratory ruling as to whether a portion of the final offer of the New Lisbon Education Association complied with the provisions of Sec. 111.70(4)(cm)8m, Stats. and ERB. 32.10(2). The parties waived hearing and thereafter filed written argument, the last of which was received on February 9, 1993.

Having considered the matter, the Commission makes and issues the following

FINDINGS OF FACT

1. The New Lisbon School District, herein the District, is a municipal employer having its principal offices at New Lisbon, Wisconsin.

2. The New Lisbon Education Association, herein the Association, is a labor organization representing certain employes of the District and having its principal offices at 2020 Caroline Street, P.O. Box 684, LaCrosse, Wisconsin 54602-0684.

3. During collective bargaining over a 1991-1993 collective bargaining agreement, a dispute arose between the parties as to whether the following Association proposal complied with the provisions of Sec. 111.70(4)(cm)8m, Stats., and ERB. 32.10(2).

2. ARTICLE XXI

Term of Agreement

A. This Agreement shall be effective as of July 1, 1991, shall be binding upon the Board and the Association, and shall remain in force and effect through June 30, 1993.

B. If the parties have not reached agreement on a successor collective bargaining agreement as of the expiration of this agreement, the Board agrees that, pending negotiations over a successor agreement, the Board will maintain the status quo as defined by this agreement with respect to all mandatory subjects of bargaining, including union security. The parties further agree to submit any disputes regarding the meaning of the expired agreement to grievance arbitration under Article XIX.

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

CONCLUSION OF LAW

The Association proposal set forth in Finding of Fact 3 does not comply with Sec. 111.70(4)(cm)8m, Stats., and ERB. 32.10(2) because it proposes a contract term other than two years.

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

DECLARATORY RULING 1/

Because the Association proposal set forth in Finding of Fact 3 does not comply with Sec. 111.70(4)(cm)8m, Stats., and ERB. 32.10(2), the Association cannot submit said proposal as part of its final offer in an interest-arbitration proceeding pursuant to Sec. 111.70(4)(cm)6, Stats.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

(Footnote 1/ appears on the next page.)

I concur in part and dissent in part.

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

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues)

in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's

interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

NEW LISBON SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

The District

The District asserts that the Association proposal requires it to comply with the grievance arbitration and union security provisions in a collective bargaining agreement for a term in excess of two years and thus does not comply with Sec. 111.70(4)(cm)8m, Stats. and ERB. 32.10(2). In addition, the District argues that the proposal sets no limit on the duration of the District's obligation to honor the union security and grievance arbitration provisions and thus could result in a contract term in excess of three years, also contrary to Sec. 111.70(4)(cm)8m, Stats.

The District asserts that although the Association proposal contains a nominal two year contract duration clause, the effect of the proposal is to require District compliance with the agreement for a period in excess of two years. The District contends that although it can voluntarily agree to such a contract duration, the Association is not entitled to submit such a final offer to the interest arbitration process.

The District acknowledges that it can agree to proceed to grievance arbitration during a contract hiatus and/or to honor union security provisions during such a hiatus. However, the District contends that where, as here, such agreements have the effect of extending the term of a collective bargaining agreement beyond two years, such a proposal cannot be submitted to interest arbitration.

The District asserts the Commission should reject Association arguments that this proposal is something other than a "collective bargaining agreement", subject to the provisions of Sec. 111.70(4)(cm)8m, Stats. and ERB. 32.10(2). The District urges the Commission to see the Association offer as a proposal which creates an alternative contract duration contingent on a contract hiatus period. Because such a proposal creates a contract duration for a period other than two years, the District asks the Commission to conclude that the Association's final offer is not in compliance with the statute and administrative code and must be amended.

The Association

The Association summarizes its position as to the disputed proposal as follows:

> The issue before the Commission is whether the requirements that arbitrated collective bargaining agreements be for a period of two years, and that no collective bargaining agreement be for more than three years, were intended to prohibit parties from proposing and taking to arbitration any provision which dealt with the parties' obligations during the hiatus after expiration. The parties have made very technical and involved arguments based on the statutory language and prior Commission case law. The language the Legislature used in section 8m, as it applies to hiatus provisions is, at best, quite ambiguous. The task of the Commission therefore, really comes down to deciding the Legislature's intent when it enacted section 8m. When the Legislature placed the duration provisions in the statute, did it intend to eliminate the arbitration

> of provisions regarding hiatus? The Association submits that it clearly did not. The provision had two purposes: to limit the ability of employers and unions to establish unreasonably long contract bars and to prevent parties from arbitrating too frequently, creating instability and long hiatus periods between contracts.
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> The Commission should read section 8m consistent with legislative intent. The Legislature never intended to prohibit the common and stabilizing practice of clauses which address the problems inherent in hiatus periods. The Association respectfully requests that the Commission hold its proposal to be proper.

DISCUSSION

During a contract hiatus, a municipal employer's duty to bargain generally obligates it to maintain the status quo as to matters primarily related to wages, hours and conditions of employment. 2/ However, although union security and grievance arbitration provisions are primarily related to wages, hours and conditions of employment, the municipal employer's status quo obligations do not include honoring any contractual union security 3/ or grievance arbitration provisions. 4/

The Association's proposal would contractually obligate the District to continue to honor existing union security and grievance arbitration provisions during a contract hiatus. The District asserts that the proposal runs afoul of Sec. 111.70(4)(cm)8m, Stats. and ERB. 32.10(2). We agree.

Section 111.70(4)(cm)8m, Stats. provides, in pertinent part:

> 8m Term of agreement; reopening of negotiations. Except for the initial collective bargaining agreement between the parties and except as the parties otherwise agree, collective bargaining agreements covering municipal employes subject to this paragraph shall be for a term of 2 years. No collective bargaining agreement shall be for a term exceeding 3 years. (Emphasis added).

Section ERB. 32.10(2) provides, in pertinent part:

> (2) CONTENTS REGARDING TERM OF AGREEMENT AND

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

3/ Sauk County, Dec. No. 22552-B (WERC, 6/87); aff'd 148 Wis. 2d 392 (Ct.App. 1988). However, during a contract hiatus, the parties can agree to continue to honor union security provisions. Sauk County, supra.

4/ Racine Schools, Dec. No. 19983-C (WERC, 1/85); Greenfield Schools, Dec. No. 14026-B (WERC, 11/77). However, as with union security, the parties can agree during a hiatus to utilize grievance arbitration to resolve disputes.

> REOPENER PROVISIONS. Except for the initial collective bargaining agreement between the parties affecting the employes involved, where the parties have not agreed upon the term of the agreement as a part of the stipulation of agreed upon terms, final offers shall provide for no other term of agreement than 2 years. Final offers may not contain a provision for reopening of negotiations during the term of an existing agreement for any purpose other than negotiation of a successor agreement or with respect to any portion of an agreement that is declared invalid by a court or administrative agency or rendered invalid by the enactment of a law or promulgation of a federal regulation. (Emphasis added).

In our view, the Association's final offer contains a term of agreement other than two years for union security and grievance arbitration. Through its offer, the Association would establish a District contractual obligation to honor union security and grievance arbitration for a period which could exceed two years. While the District can voluntarily agree to such a proposal, Section 111.70(4)(cm)8m, Stats. and ERB. 32.10(2) preclude the parties from proceeding to interest arbitration over such an offer. 5/

In its effort to escape the impact of Sec. 111.70(4)(cm)8m, Stats., the Association argues that its hiatus proposal does not seek to establish a "collective bargaining agreement", but rather, to create a contingent entity separate and distinct from the 1991-1993 contract which is thus not subject to the term of agreement restrictions imposed by Sec. 111.70(4)(cm)8m, Stats. However, if the Association proposal does not seek to establish a collective bargaining agreement, interest arbitration is unavailable in any event. 6/ Further, if the Association proposal is viewed as seeking to establish a contingent collective bargaining agreement in addition to the 1991-1993 contract, then the Association is essentially seeking to arbitrate two collective bargaining agreements at the same time, which in turn runs afoul of the Sec. 111.70(4)(cm)6, Stats. provision that interest arbitration is available to establish "a new collective bargaining agreement." (Emphasis added).

Thus, ultimately, as the Association itself acknowledges on page 6 of its reply brief, the disputed proposal is part of the overall master 1991-1993 collective bargaining agreement. Because the Association's proposal as to union security and grievance arbitration establishes a contractual obligation to honor these provisions of the 1991-1993 contract for a period which could exceed two years, Sec. 111.70(4)(cm)8m, Stats. and ERB. 32.10(2) prohibit the

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5/ Through Sec. 111.70(4)(cm)8m, Stats., the Legislature eliminated the parties' ability to arbitrate disputes over the term of an agreement. The Association has presented significant argument as to why the parties might wish to voluntarily agree to the proposal. Nothing in our decision prevents such an agreement. However, in the face of the clear language of Sec. 111.70(4)(cm)8m, Stats., arbitration over the proposal is unavailable.

6/ Section 111.70(4)(cm)6, Stats. establishes that interest arbitration is available "with respect to any dispute. . .over wages, hours and conditions of employment to be included in a new collective bargaining agreement. . .(Emphasis added).

Association from including this proposal in its final offer. 7/

Dated at Madison, Wisconsin this 26th day of April, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

7/ When bargaining and, if necessary, arbitrating a successor to the 1991-1993 contract, the Association can, of course, propose that the successor agreement be retroactively applied to cover any contract hiatus and thereby obligate the District to retroactively comply with the union security and grievance arbitration provisions in the successor contract. Sauk County v. WERC, 165 Wis. 2d 406 (1991); Berns v. WERC, 99 Wis. 2d 252 (1980).

NEW LISBON SCHOOL DISTRICT

Dissenting and Concurring Opinion of Chairman Hempe

I dissent in part; I concur in part. As to the result, however, this Commission is unanimous.

The majority believes that ". . .section 111.70(4)(cm)8m, Stats., and ERB 32.10(2) preclude the parties from proceeding to interest arbitration. . ." as to the hiatus proposal made by the Association.

I disagree.

Under the Association's proposal, all provisions of its collective bargaining agreement which dealt with mandatory subjects of bargaining would be resurrected when the collective bargaining agreement expired and would remain in effect until a successor agreement had been successfully negotiated by the parties or imposed by subsequent interest arbitration. Provisions dealing with mandatory subjects of bargaining would explicitly include the grievance procedure and fair share agreement.

This is not a radical proposal. 8/ In contrast to the majority's view, neither do I find it contrary to the provisions of s. 111.70(4)(cm)8m or ERB 32.10(2). As the Association points out, its hiatus proposition does not attempt to extend the duration of the collective bargaining agreement which would precede it beyond the maximum contemplated by the statute. To avoid that obstacle, it creates, instead, a separate agreement to deal with a possible contract hiatus in a rational, predictable fashion, consistent with the existing status quo. Neither the statutes nor the administrative rules forbid this.

So far, so good. But, in my view, this gets the Association to a cul-de-

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8/ Municipal employers are already required to maintain status quo as to matters primarily related to wages, hours and conditions of employment. City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

While grievance procedures are considered to be mandatory subjects of bargaining, they are perceived to be creatures of contract. Hence, when a collective bargaining agreement containing provisions for a grievance procedure expires, absent a new agreement between the parties which either continues the previously existing grievance procedure or establishes a new one, the old procedure which was a part of the now expired contract is not deemed a part of the status quo which the employer must observe. Greenfield School Board, Dec. No. 14026-B (WERC, 11/77). Disputes as to whether or not the employer has honored its obligation to maintain status quo are thus addressed through the more cumbersome and lengthy complaint procedures set forth in s. 111.70(4)(a). By proposing that a new agreement take effect during any subsequent contract hiatus, however, the Association appears to be responding to the objection that there can be no grievance procedure without some sort of an agreement in place which provides for one.

Neither has a contractually established "fair share" (or any union security clause) been deemed a part of the status quo which the employer is required to maintain during a hiatus. As with grievance procedures, union security clauses are deemed to be mandatory subjects of bargaining which gain vitality solely through agreement between the parties. Sauk County, Dec. No. 22552-B (WERC, 6/87).

sac, at best, not to its final objective of interest-arbitration. It is thus at this point that I merge into substantial agreement with the majority. For as the majority suggests, if the Association proposal is truly a separate agreement, independent of and different from the collective bargaining agreement within which it is contained, there is no statutory authority for such a contrivance to be brought to interest-arbitration; if, on the other hand, it is a collective bargaining agreement in its own right, the statutes authorize interest-arbitration for only one collective bargaining agreement per set of parties at a time.

This is not to say that the parties to a labor dispute may not reach a voluntary hiatus agreement covering either a grievance procedure or union security, or both, along with other items of importance to them. 9/ Undeniably, this offers a certain incongruity to the result we reach today: the parties are barred from receiving in interest arbitration that to which they are otherwise permitted to agree. But this is a sort of incongruity which already exists in

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9/ Sauk County, Dec. No. 22552-B (WERC, 6/87) expressly allows the parties to agree to continue union security provisions during a contract hiatus. Neither are there any legal barriers to an agreement between the parties that grievance arbitration be used as a dispute resolution mechanism during a contract hiatus. Racine Unified Schools, Dec. No. 19983-C (WERC, 1/85); Greenfield School Board, Dec. No. 14026-B (WERC, 11/77).

In the instant matter, the Employer argues that the Association's hiatus proposal is (also) flawed because it contemplates an indefinite term, defined only by the understandably unpredictable length of a possible hiatus. Conceivably (though not probably), this could result in an actual hiatus agreement duration which would end up exceeding the 3 year statutory term limitation for voluntary agreements set forth in s. 111.70(4)(cm)8m. It should be clear, however, that the Commission would not enforce any voluntary hiatus agreement for a period beyond the permitted statutory term maximum.

at least one other area. 10/ Until the Legislature determines the incongruity herein to be contrary to a sound public policy, however, it is one which this Commission has no choice but to continue to enforce.

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

10/ E.g., parties are permitted to place to place permissive subjects of bargaining in voluntary collective bargaining agreements, but may not include them in final offer proposals headed for interest arbitration if objection is made.