STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CADOTT EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF CADOTT COMMUNITY, Respondent.	:	Case 17 No. 49639 MP-2775 Decision No. 27775-B

Appearances:
Ms. Mary E. Pitassi, Associate Counsel, and Mr. Stephen Pieroni, Staff Counsel, Wis
Mr. Stephen L. Weld, Weld, Riley, Prenn and Ricci, S.C. on behalf of the District.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Cadott Education Association, having on August 3, 1993, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the School District of Cadott Community had violated Section 111.70 (3)(a) 4 and 1, Stats., by its unilateral imposition of sick leave and medical leave on certain bargaining unit employes. The Commission appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5) Stats. Hearing on the complain was held on October 14, 1993, in Cadott, Wisconsin. A stenographic transcript was made and received on November 18, 1993. The parties completed their briefing schedule on December 13, 1993. The Examiner, having considered the evidence and 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. The School District of Cadott Community, hereinafter referred to as the Respondent or the District, is a municipal employers engaged in the operation of a public school system. Its principle place of business is P.O. Box 310, Cadott, Wisconsin 54727. At all times relevant and material, Mr. Robert L. Butterfield has occupied the position of Superintendent for the District, and has been an agent of the District.

2. The Cadott Education Association, hereinafter referred to as the Complainant or the Association, is a labor organization, whose principal place of business is c/o Mary Virginia Quarles, Central Wisconsin UniServ Council, Box 1606, Wausau, Wisconsin 54401.

3. The District and the Association have been parties to a series of collective bargaining agreements, the most recent agreement extending from July 1, 1992 through June 30, 1994. The current agreement contained the following provisions:

> ARTICLE III - FRINGE BENEFITS
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> C. Employee illness leave will be granted on the basis of ten (10) days annually accumulative to 120 days. Personal doctor and dentist appointments are counted as employee illness leave.
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> . . .
>
> ARTICLE VII - SCHOOL CALENDAR
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> B. The first two days missed because of inclement weather will not be made up by the teachers or the students.
>
> C. Paid holidays in the school calendar will be Memorial Day, Thanksgiving and Labor Day.
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> . . .
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> ARTICLE XI - GRIEVANCE PROCEDURE
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> Definition: ... For purposes of this article, "days" shall mean those upon which the Central Business Office is officially open for business.
>
> Step 1: An aggrieved teacher of the Association shall promptly attempt to resolve any grievance informally between the grievant and the principal or immediate supervisor. The grievant may choose to be accompanied by a representative or spokesperson. If the grievance is not resolved informally, the grievant shall submit the grievance in writing within fifteen (15) days of the time he/she became aware of the grievance. The written grievance must identify the grievant, provide the factual basis for the grievance, specify the contractual provision violated and the relief sought. If the written grievance is not submitted within fifteen (15) days, it will be deemed waived. The principal or immediate supervisor will reply in writing to the grievant, with a copy to the Association, within ten (10) days after receipt of the written grievance. If no response is received within ten (10) days or if the grievant is not satisfied with the response, the grievant may proceed to step 2.

Step 2: If the grievance is not settled in Step 1 and the teacher wishes to appeal the grievance to Step 2, the teacher may file the grievance in writing to the superintendent of schools within 10 days after receipt of the principal's written answer. The written grievance shall give a clear and concise statement of the alleged grievance including the fact upon which the grievance is based, the issues involved, the agreement provisions involved, and the relief sought. The superintendent or his/her representative shall thoroughly review the grievance, arrange for necessary discussions, and give a written answer to the teacher with a copy to the Association no later than 10 days after receipt of the written grievance.

Step 3: If the grievance is not resolved in Step 2, the grievant may file the grievance in writing with the Clerk of the Board within 10 days after receipt of the answer from the superintendent or his/her representative. A grievance not timely filed with the Clerk of the Board shall be deemed resolved against the teacher.

The Board shall consider the grievance at its next regular meeting, or the following meeting or at any special meeting called for that purpose in the interim. A representative of the Association and the teacher shall have the right to present their position to the Board at such meeting.

The Board shall, within 10 days after the meeting, advise the teacher and the Association in writing of the action taken with regard to the grievance.

Step 4:

1. If a satisfactory settlement is not reached at the Board, the grievant or the Association must notify the District Administrator in writing, within ten (10) days of receipt of the Board's decision, if it is intending to process the grievance to arbitration.

2. The arbitrator is to be selected as follows: The Board and the Association shall use their best efforts to select a mutually agreeable arbitrator. If the Board and the Association are unable to agree on the arbitrator within fifteen (15) days, either party may request the WERC to prepare a list of five (5) impartial arbitrators. The Association

and the Board shall then alternately strike two each on a slate with a coin toss determining the first and third strikes. The Association and the Board shall exercise their strikes within fifteen (15) days from the date of the slate from the WERC. The remaining arbitrator shall be notified of the appointment in a joint statement.

The cost of the arbitration, including the fees and expenses of the arbitrator and the transcript fees, shall be borne equally by the Association and the Board. However, each party shall bear its own costs for witnesses and all other out-of-pocket expenses including possible attorney fees.

The arbitrator shall schedule a hearing on the grievance at the convenience of all parties and, after hearing such evidence as the parties desire to present, shall render a written recommendation. The arbitrator shall have no power to advise on salary adjustments, except as to the proper application thereof, nor to add to, subtract from, modify or amend any terms of this agreement. The arbitrator shall have no power to substitute his discretion for that of the Board in any manner not specifically contracted away by the Board. A decision of the arbitrator shall, within the scope of his authority, be binding upon the parties.

. . .

ARTICLE XV - MANAGEMENT RIGHTS

The School Board possesses the sole right to operate the District and all management rights repose in it except to the extent as abridged, delegated or modified by provisions of this agreement. These rights include but are not limited to the following:

1. To direct all operations of the District;

2. To establish reasonable work rules and schedules of work;

. . .

6. To maintain efficiency of the District's operations;

. . .

8. To introduce new or improved methods or facilities

9. To change existing methods or facilities;...

There is no maintenance of standards provision nor zipper clause in the current agreement.

4. On or about November 26, 1992, the District deducted 7.5 hours of sick leave from the accrued sick leave allotment of Andy Edgell, a member of the professional bargaining unit represented by the Association. It made the deduction for Thanksgiving Day, 1992: a paid holiday under the parties' current agreement. Edgell returned to work on December 11, 1992, and questioned the deduction when he learned of it. He did not, however, contact a union official until January 28, 1993.

5. The Association filed a grievance over this matter on February 12, 1993, claiming violations of Article III, Section C and Article VII, Section C of the collective bargaining agrement. Superintendent Butterfield answered said grievance by letter to Dave Vajgrt, Grievance Chairperson for the Association, explaining that the District deducted a sick day on holidays for employees who missed the working days immediately before and after the holiday. During the course of investigating the grievance, the Association discovered that numerous other bargaining unit members had been charged with paid sick leave and unpaid medical leave instead of receiving holiday pay.

6. In agreements previous to the most recent 1992-1994 collective bargaining agreement, there was no provision relating to paid holidays, although the District had a practice of paying for three specific holiday, Labor Day, Thanksgiving, and Memorial Day, for at least twelve years. During negotiations for the current agreement, the Association persuaded the District to acknowledge the existing practice of paying for the three holidays and to include a provision in the collective bargaining agreement to this effect. Although the practice of paying for three holidays per school year had existed prior to the current agreement, the District's treatment of holidays which fell during an employe's leave of absence so that the employe did not work on the next working day prior to and after the holiday was not as consistent. Respondent District dealt with this situation in the following manner in the past:

- In the school year 1985-1986, employes were docked a sick day for the holiday if they were absent both before and after the holiday.

- In the school years 1986-1987 to 1990-1991, this policy was changed so that employes were not docked a sick leave day for any holidays which fell during the school year, irrespective of whether they worked both days or were absent on one or both days.

- In 1990-1991 and to the present, the District returned to the 1985-1986 practice of deducting the sick day if the employee was absent on the work days immediately prior to and after the holiday.

7. No grievances were ever filed by the Association or by individual bargaining unit members prior to the Edgell grievance noted in Finding of Fact 5, above.

8. The Edgell grievance is being processed through the grievance arbitration procedure of the parties' collective bargaining agreement. The matter is currently being scheduled for hearing before an arbitrator.

9. The instant complaint was filed on August 3, 1993. It alleges that Respondent District interfered with, restrained, and coerced municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and violated Sec. 111.70 (3)(a)4. and 1, Stats. by it unilateral imposition of sick leave and medical leave in lieu of holiday pay while failing to bargain with the Complainant Association.

10. Respondent District in its answer dated August 26, 1993, moved to have the complaint dismissed asserting that an Arbitrator had already been selected by the parties to hear the grievance, that the parties were attempting to schedule the arbitration hearing, that the issue to be addressed by the arbitrator is same issue raised by the prohibited practice, and that the Association is seeking to have the same case decided in multiple forums contrary to Commission precedent which calls for deferral to the grievance-arbitration process.

11. By letter dated August 26, 1993, the Association, in response to the District's Motion to Dismiss informed the Examiner that it had no objection to submitting the matter to arbitration consistent with the Commission's deferral policy, provided that the District was willing to renounce procedural and substantive arbitrability objections. Absent the District's waiving such objections, the Association requested the Commission to exercise its jurisdiction over this statutory issue.

12. By letter dated September 10, 1993, the District informed the Examiner that it was willing to waive any substantive arbitrability objections but that it was not willing to waive any procedural arbitrability questions which have been raised in a timely fashion.

13. The Examiner issued an Order Denying Motion to Defer to Grievance Arbitration. She concluded that deferral under the circumstances was inappropriate and found that hearing on the merits was warranted and should not be delayed.

14. Deferral in the instant matter is inappropriate because the Respondent District is unwilling to renounce technical objections with respect to procedural timeliness in the filing of the grievance so as to insure consideration of the underlying statutory allegation by the arbitrator on the merits.

15. The parties bargained over the subject of holiday pay and included a provision in their 1992-1994 collective bargaining agreement, Article VII, Section C. Once the collective bargaining agreement had been agreed to, the District did not bargain with the Association over the District's decision to require employes to have worked the day prior to and the day after the holiday to receive holiday pay rather than sick leave for the holidays. The subject of eligibility for holiday pay is subsumed into the topic of holiday pay and addressed by various provisions of the parties' collective bargaining agreement.

16. The Respondent District was not obligated to bargain over the holiday pay eligibility of employes on medical or sick leave with the Complainant Association because it bargained with the Association on this topic during negotiations and the subject is addressed in the collective bargaining agreement. Contractual waiver with respect to holiday pay eligibility exists.

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

CONCLUSIONS OF LAW

1. Assertion of the Commission's jurisdiction to consider the merits of this matter is appropriate because the Respondent District would not waive procedural objections to the timeliness of the grievance filed which relates to this matter so that there is not a substantial probability that it will be considered by the arbitrator on the merits.

2. The issue of holiday eligibility for bargaining unit employees on sick or medical leave is addressed in the parties 1992-1994 collective bargaining agreement. The Respondent District does not have a statutory duty to bargain with the Complainant Association over this matter which is addressed in the parties' collective bargaining agreement or has been waived in the bargaining of said agreement. Accordingly, the Respondent District did not violate Section 111.70(3)(a) 4 and 1, Stats, by its conduct herein.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

The instant complaint be and hereby is dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

1/ 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

SCHOOL DISTRICT OF CADOTT COMMUNITY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

Most of the relevant facts in the instant case are essentially

undisputed.
The District had a long-term past practice of at least twelve years of paying holiday pay for three holidays each year, Labor Day, Thanksgiving Day, and Memorial Day. Said practice was not set forth anywhere in the parties' previous collective bargaining agreements. During the negotiations for the current agreement, the Association prevailed upon the District to include Article VII, Section C in the contract as a codification of the existing "practice" between the parties.

The District's treatment of bargaining unit employes on long-term sick leave or extended medical leaves of absence over the last seven years regarding their receipt of holiday pay for the holidays has not been as consistent. During the 1985-86 school year it did not pay holiday pay, but rather docked sick leave for any employes who did not work both the work day before and the work day after the holiday. In the 1986-87 school year and for three years thereafter, it appears to have abandoned this practice and simply paid the holiday pay to affected employes. However, during the 1990-1991 school year it reverted back to its former practice of docking sick leave unless the employe had worked the work days prior to and after the holiday and has done so to the present.

The District provided affected employes with sick leave accounting slips. During the current contractual term, a bargaining unit member, Andy Edgell, discovered that he was docked sick leave for the Thanksgiving holiday when he returned to work sometime around December 11, 1992. During the course of its investigation of the Edgell grievance, the Association discovered numerous other examples of the District's deductions as they relate to other bargaining unit members. The Association filed a grievance on February 12, 1993 on behalf of Edgell and the other affected bargaining unit members.

POSITION OF THE PARTIES:

Complainant Association

The Association sets forth two major arguments in support of its position. It alleges that the District committed a prohibited practice by unilaterally deducting sick leave for contractually guaranteed paid days without notifying the Association. In this argument it stresses that the Association did not waive its right to bargain over this issue prior to the Respondent's implementation of the sick leave deductions. As a second contention it claims that the District's argument that its decision to deduct sick leave on contractually-guaranteed paid days in certain circumstances constituted a past practice is not persuasive because its policy was inconsistently applied and not mutually accepted by the parties.

With respect to the first argument, the Association contends that contractually guaranteed paid days constitute a mandatory subject of bargaining and that a unilateral change in contractually-guaranteed paid days constitutes a failure to bargain in violation of Section 111.70(3)(a)(4). The District's decision to enact a "policy" or "work rule" is not a valid basis for altering the status quo because management is limited by the specific and express terms of the collective bargaining agreement.

Noting that the Respondent District failed to notify the Association of its intentions before implementing its "policy" prior to either the 1991-92 or 1992-93 school years, the Association suggests that it is impossible to bargain if one party is systematically kept unaware of changes implemented by the other --- especially when, the party withholding the information has a legal duty to initiate bargaining.

Claiming that waiver has only grudgingly been found to constitute a defense to a charge of unilateral implementation when there is "clear and unmistakable" evidence and the finding of such waiver is based on specific contract language or bargaining history, the Association asserts that it could hardly waive a right to bargain about a District action of which it was unaware. In any event, the Association notes that the contractual description of "employe illness leave," Article III, Section C, makes no mention whatsoever of any possible leave substitution. According to the Complainant Association, the most recent round of bargaining between the parties and the agreements which resulted from that round of bargaining should be regarded as the last official work on sick leave and paid holidays.

In addressing its second contention, the Association avers that an examination of the leave summary sheets for employes leads one to conclude that the policy was confusing and ambiguous. According to the Association, because the summary leave sheets are signed days or even weeks after the taking of a leave, it is likely that the employes were unaware of the discrepancy between deduction for sick leave rather than holiday pay. The District's behavior in the Association's view has been far too uneven to qualify as a bona fide past practice. Arguing in the alternative, the Association alleges that even if the District had notified individual bargaining unit members effectively, it cannot claim that such notice also constitutes notice to the Association. The Association could not have given its explicit or tacit agreement to the District's implemented policy because it had not been notified as an organization through its representatives as to what the District was doing. Noting that there was no mutuality between the parties regarding the alleged practice, the Associations insists that it should not be found to exist and be binding.

Respondent District

The Respondent District makes a number of arguments with respect to both Commission jurisdiction and the merits of the instant dispute. It maintains that the Examiner abused her discretion by taking jurisdiction over the issues raised in the complaint filed on August 3, 1993. It maintains that said complaint should have been deferred to grievance arbitration. Stressing the longstanding Commission policy of deferral, the Respondent points out that deferral is appropriate when there is a high probability that a grievance arbitration would fully resolve not only a 111.70(3)(a)5 claim but also an unlawful unilateral change claim under Section 111.70(3)(a)4. The Commission's holding to this effect in Brown County 2/ should control the instant situation in its view and the Examiner's reliance on dicta in that case is erroneous and not good public policy. Moreover, according to the Respondent District, the Examiner's refusal to defer has not been followed by the Commission in subsequent cases.

In the District's view, the decision not to defer effectively erases the grievance procedure's contractual timelines, negating the mutually agreed-upon grievance procedure timelines. If it is the Commission's policy to not defer to grievance arbitration when there are questions as to whether the grievance has been timely processed, the District strongly encourages the Commission to reconsider that limited issue. According to the District, procedural issues such as timeliness are clearly within the arbitrator's jurisdiction, part and parcel of the procedure agreed-upon by the parties to police the collective bargaining agreement. Alleging that the grievants, Edgell and the Association, waited too long to file the grievance, the Respondent argues that the grievance

2/ Dec. No. 19314-B (WERC, 6/83)

should be deemed waived.

The District bolsters its argument that the Examiner erred by two sub-arguments. It suggests that the collective bargaining agreement clearly addresses itself to the dispute. Because there is no dispute as to the existence of the collective bargaining agreement and there is no dispute that the collective bargaining agreement contains a binding arbitration clause, the District maintains that the dispute is amenable to grievance arbitration. Moreover, it does not involve important issues of law or policy.

With respect to the merits, Respondent asserts that the Association has failed to prove a Section 111.70(3)(a)4 violation by the District. Because the District has already bargained the right to adopt reasonable work rules, its decision to substitute sick leave for paid holidays was not, and is not, a Section 111.70(3)(a)4 violation. The Respondent District argues that the management rights clause clearly and unmistakably permits the District to unilaterally adopt a work rule to this effect and constitutes an express waiver by the Association of its right to bargaining over reasonable work rules and policies. The waiver, in the District's opinion, is clear and unmistakable.

According to the District, its treatment of the grievant Edgell was consistent with a practice that the District had followed, without objection from the Union, for over three years. Pointing out that the Association's witness acknowledged that the practice was in place during the last three school years, the District suggests that if the Association was unhappy with the practice, it could have dealt with it at the bargaining table but chose not to do so.

The Respondent submits that the right to holiday pay is a creature of contract which does not exist as a matter of law. The reasonableness of a specific work rule is just such a contractual issue which is appropriately before a grievance arbitrator and not the Commission. If the Examiner finds for the Association, she will render meaningless a clear and unequivocal provision of the collective bargaining agreement, the reservation of management's right to adopt reasonable work rules. This is contrary to the parties' intent and to MERA.

The District urges the Examiner to find that the past practice controls and that the Association's failure to file a grievance within the past three years results in waiver on the Association's part. Failure by the Association to file a grievance may be construed as acceptance of the past practice. There was, it alleges, mutual acceptance of a practice which had been in existence for the past three years. The untimely challenge by the Association must be rejected.

Association's Reply

In its reply, the Association argues that the Examiner correctly asserted the Commission's jurisdiction to hear the merits of the complaint. According to the Association, the decision in Brown County, supra, is inapposite to this case. The employer in Brown County did not refuse to relinquish procedural defenses to the grievance. Secondly, the Examiner cannot be fairly characterized as relying on the Commission's "dicta" in refusing to defer. The core of the Commission's long-standing deferral policy is to defer where there is a "high probability" that grievance arbitration would fully resolve the refusal to bargain claim. Consistent with numerous decisions of the Commission, the Examiner appropriately concluded that the Respondent District's refusal to renounce objections to procedural arbitrability reduced the likelihood of a decision on the merits. Assertion of jurisdiction is appropriate under the circumstances.

The Association maintains that if the District's position were to prevail, the parties could be put to the expense of litigating the case before an arbitrator, only to have it dismissed as untimely. The Complainant would then have to seek redress under the Commission's pendent jurisdiction on the refusal to bargain claim. This would result in an unnecessary hearing before and arbitrator resulting in wasteful and inefficient expenditures of resources for all parties involved. It would be bad public policy.

With respect to the District's contention that it has the right to adopt reasonable work rules, the Complainant Association contends that this argument was advanced and rejected by the Commission in St. Croix Falls School District. 3/

The Association disputes the District's contention that the Association was aware of the Respondent's unilateral policy prior to discovering Edgell's situation. According to the Association, the District failed to promulgate the policy in writing, failed to explain this policy orally to all the member of the bargaining team, failed to distribute the alleged policy on a regular basis to new employes and no officer of the Association was aware of the District's subtle diminution of paid holidays and snow days until edgell reported his situation to Gunderson in January of 1993. It maintains that it acted promptly upon discovering the surreptitious manner in which the District diminished the contractual paid holiday provision.

Based upon the arguments set forth herein, the Association seeks an order which appropriately remedies Respondent's illegal conduct.

District's Reply

The Respondent District takes issue with the Association's contention that Edgell was away from his classroom during most of December and a portion of January of the 1992-1993 school year, having little or no contact with administrators or with fellow bargaining unit members during this time. It stresses that Edgell worked all nine work days scheduled after December 11 and 17 of 20 scheduled work days in January. According to the District, when deduction from sick leave was made, Edgell was made aware of that deduction in December, and pursuant to the terms of the collective bargaining agreement, it was up to Edgell to submit the grievance in writing within fifteen days of the time he became aware of it.

In response to Association arguments that management's decision to enact a policy or work rule is not a valid basis for altering the status quo because management is limited by specific and express terms of the contract citing St. Croix Falls School District, supra., Respondent District states that this decision is being appealed and that it is distinguishable from the instant case because St. Croix Falls concerned a unilateral change in work rules during a contract hiatus while there is a contract in place in the instant case.

Noting that the instant case is a contract situation and that there has been no change in "practice", the District insists that there has been no change in the status quo for over three years. In response to Association assertions that the District was obligated to notify and bargain with the Association before implementing its "policy", the District argues that it had no obligation to notify the Association because it had already bargained the right to adopt reasonable work rules. In the Respondent's view, the

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3/ Dec. No. 27215-B, 27215-D (WERC, 7/93).

Association waived its right to bargain over reasonable work rules and policies. The Respondent contends that its sick leave use verification process, which requires the signature of sick leave users confirms that the bargaining unit members knew or should have known how holidays/inclement weather days were being treated.

In answer to the Association's argument that Article III, Section C of the collective bargaining agreement "makes no mention whatsoever of any possible leave substitution," Respondent claims that the absence of any specific prohibition on substitution in Article II or elsewhere in the contract allows the District to unilaterally adopt work rules. If the Association had wanted to restrict management's rights in this area, it should have negotiated a "no substitution" provision at the bargaining table.

Noting that the leave cards have been used by the District for twenty years, the District disputes Association contentions that the leave cards are too complicated. The Association's contention that its members do not know that a specific date is a holiday clearly lacks credibility.

Insofar as Association arguments regarding the uneven application of District policy are concerned, the Respondent asserts that for at least three years the practice has been uniformly applied. It claims that bargaining unit members had the opportunity to discover the practice, understand it and protest it if they did not agree. The District's practice, it avers, was open, notorious, and understood. In this vein, it suggests that the only rational reason for the Association's inaction is that its members understood what was being done and acquiesced.

Claiming that Edgell was made aware of the substitution in December of 1992, the Respondent argues that the 15-day period of Step 1 of the grievance procedure ran out long before the Union filed its grievance and that the grievance should be deemed waived.

The District requests deferral or dismissal of the instant complaint.

DISCUSSION:

Deferring the Claim to Grievance Arbitration

Because the Respondent has reiterated its objections to the Examiner's refusal to defer the instant dispute to the parties' grievance arbitration process, it is necessary to address this issue prior to proceeding with the merits. Respondent District is correct in noting the Commission's strong preference for deferring to the parties agreed-upon contractual grievance-arbitration mechanisms. 4/ In most cases alleging Section 111.70(3)(a)(5) breach of contract allegations, the Commission has refused to take jurisdiction where there is a final and binding arbitration procedure in existence and where the complainant has failed to exhaust the parties' contractual grievance and arbitration procedures. As the District has noted, where a Section 111.70(3)(a)5 violation has been alleged the sole exceptions to deferral have been waiver of the arbitration procedure by both parties or a showing that the union has been frustrated in its attempts to utilize the

4/ Joint School District No. 1., City of Green Bay, et al., Dec. No. 16753-A, B (WERC 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B, C (WERC,6/79); Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/72).

grievance arbitration procedures. 5/

The Commission's policy favoring deferral within the context of Section 111.70(3)(a)5 allegations is inherently reasonable because the underlying issue for resolution is contractual in nature and best left to an arbitrator when grievance arbitration is available. Such has not been the case where Section 111.70(3)(a)4 statutory violations are alleged. The Commission has been slightly more circumspect in its deferral policy. Only where there is a high probability that grievance arbitration would fully resolve an unlawful unilateral change claim alleged to be a violation of Section 111.70(3)(a)4 as well as any corresponding Section 111.70(3)(a)5 claim has the Commission found deferral to be appropriate. 6/

Moreover the Commission has set forth the following criteria in deciding whether it is appropriate to exercise its jurisdiction:

> (1) the parties must be willing to arbitrate and renounce technical objection which would prevent a decision on the merits by the arbitrator;
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> (2) the collective bargaining agreement must clearly address itself to the dispute; and
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> (3) the dispute must not involve important issues of law or policy. 7/

The Examiner, in evaluating this criteria, has no difficulty concluding that the second and third criteria are satisfied. However, Respondent District has not satisfied the first requirement. It has refused to renounce the technical objection of timeliness in making its arguments to the designated arbitrator. 8/ Furthermore, the evidence adduced at hearing suggests that there is a strong possibility that the grievance currently filed and before an arbitrator will be disposed of as untimely with no consideration of the underlying merits of the dispute.

This Examiner believes that the current status of the Commission's deferral policy is that it will not defer allegations of Section 111.70(3)(a)4 statutory violations unless there is a strong likelihood that there will be consideration of the statutory claim on the merits. As the Commission stated in Brown County, "obviously if Respondent County raises a procedural defense before the arbitrator, such as untimely grievance filing, the merits of the dispute would remain unresolved and subject to subsequent Commission review of

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5/ Kenosha Unified School District, Dec. No. 13302-B (WERC, 1/76); and City of South Milwaukee, Dec. No. 13175-B, 13176-B (WERC, 1/76).

6/ Brown County, supra.

7/ Ibid. at p. 13. See also, School District of Sheboygan, Dec. No. 26098-B (McGilligan, 1/90).

8/ Compare City of Beloit (Fire Dept.), Dec. No.25917-B (Crowley, 8/89), aff'd. Dec. No. 25917-C (WERC, 10/89).

the Examiner's decision on the merits." 9/ While the unfair labor practice issue may be resolved in the arbitral forum, without Respondent District's agreement to waive the timelines, there would be only a slight probability that the statutory claim will ever be considered on its merits by the arbitrator. Accordingly, because the Complainant has alleged a Section 111.70(3)(a)4 statutory violation and the District has not renounced technical objections as to the timeliness of the grievance, and there is a strong likelihood that the merits of the grievance will not be addressed in the arbitral forum, deferral is inappropriate under the circumstances.

Merits

Any determination of the merits of the instant allegation must start with the premise that there was a collective bargaining agreement in effect for the entire period in which the Respondent is alleged to have made the unilateral change. The law is relatively clear regarding such action under this circumstance. Generally, a municipal employer has a duty to bargain collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of the existing collective bargaining agreement, except as to those matter which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakenly waived. 10/

The Association contends and the District does not seriously dispute in its briefs that eligibility for holiday pay is a mandatory subject of bargaining. Because eligibility for holiday pay so clearly deals primarily with compensation and benefits to bargaining unit members, that is, wages and conditions of employment, it is concluded that it is a mandatory subject of bargaining. The more difficult question to answer is whether Respondent District satisfied its obligation to bargain over this mandatory subject during negotiations such that contractual waiver exists.

It is undisputed that the parties amended their collective bargaining agreement by specifically including Article VII., Section C. into the agreement.
They clearly negotiated over the subject of holiday pay. Moreover, it is noted that the collective bargaining agreement also contains provisions relating to leave and extended leave, Article III., Sections C., D., And E., and a management rights provision, Article XV, which provides that management possesses all management rights except to the extent as abridged, delegated or modified by provisions of the collective bargaining agreement including the

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9/ Brown County at p. 13.

10/ Hartford Joint School District, No. 1, Dec. No. 27411-A (Jones, 4/93); City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86), aff'd, Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

right to establish reasonable work rules and schedules of work.

The Respondent District argues that Complainant Association contractually waived its right to bargain about work rules limiting holiday pay eligibility when it agreed to the management rights language contained in the contract. The Association in it initial brief states that "the most recent round of bargaining between the parties, as well as the agreement achieved by that bargaining, should be regarded as the Association's last official word on sick leave and paid holidays." The contentions of both parties that various provisions of the contract control the outcome of the dispute along with the fact that they expressly negotiated the subject of holiday pay leads to the inescapable conclusion that the subject of eligibility for holiday pay is included in the parties' collective bargaining agreement. Eligibility for holiday pay is subsumed into the subject of holiday pay. Just because there is no succinct provision which expressly refers to holiday eligibility in the agreement, this is not a basis for finding that this item was not negotiated and waived. 11/

Accordingly, it is concluded that Respondent District had no duty to bargain with the Complainant Association over holiday pay eligibility because this matter is already addressed in the parties' 1992-1994 agreement and contractual waiver applies. The District did not violate Sec. 111.70(3)(a)4, Stats., and the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

11/ Hartland School District, at p. 14. See also, Green Lake County, Dec. Nos. 23075-B, 27076-B (Roberts, 6/86) aff'd by operation of law, Dec. Nos. 23075-C, 23076-C (WERC, 7/86).