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-C

Appearances:

Ms. Mary E. Pitassi, Associate Counsel, and Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Association.

Weld, Riley, Prenn and Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld, and Ms. Victoria L. Seltun, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

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

On January 24, 1994, Examiner Mary Jo Schiavoni issued Findings of Fact, Conclusions of Law and Order in the above matter wherein she concluded that (1) it was appropriate to assert Commission jurisdiction over Complainant's Sec. 111.70(3)(a)4, Stats. refusal to bargain allegations but that (2) Respondent had no duty to bargain with Complainant because the matter in dispute was addressed in the parties' existing bargaining agreement. She therefore dismissed the complaint.

Both Complainant and Respondent timely filed petitions with the Wisconsin Employment Relations Commission seeking review of portions of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties filed written argument as to said petitions, the last of which was received April 4, 1994.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. Examiner's Findings of Fact 1 - 13 are affirmed.

B. Examiner's Findings of Fact 14 - 16 are set aside and the following Findings of Fact are made:

14. Because Respondent District will not waive its objection to the procedural arbitrability of the Edgell grievance, it is not highly probable that

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties 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.

227.53 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 therefor 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 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.

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submission of the Edgell grievance to arbitration would result in an award interpreting the 1992-1994 contract in a manner which would fully resolve Complainant Association's claim that Respondent District violated Sec. 111.70(3)(a)4, Stats. by docking employes a sick leave day in lieu of holiday pay.

15. The parties' 1992-1994 contract addresses the subject of holiday pay.

C. Examiner's Conclusions of Law 1 and 2 are set aside and the following Conclusions of Law are made:

1. Because it is not highly probable that submission of the Edgell grievance to arbitration would result in an award which would fully resolve Complainant Association's Sec. 111.70(3)(a)4, Stats. claim, it is not appropriate for the Commission to defer to the parties' 1992-1994 contractual grievance arbitration procedure for resolution of the issues of contractual construction and interpretation related to that claimed violation of Sec. 111.70(3)(a)4, Stats.

1/ Continued

(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.

2. Because the subject of holiday pay is addressed in the parties' 1992-1994 contract, the parties to the 1992-1994 contract have no statutory obligation to bargain with each other over the issue of holiday pay during the term of the 1992-1994 contract. Thus, the Respondent District's conduct is not violative of Secs. 111.70(3)(a)4 or 1, Stats.

D. Examiner's Order is affirmed.

Given under our hands and seal at the City of

Madison, Wisconsin this 23rd day of June, 1994.

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

CADOTT SCHOOL DISTRICT

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

BACKGROUND

Complainant Association asserts Respondent District violated Secs. 111.70(3)(a)4 and 1, Stats. by unilaterally imposing eligibility requirements for receipt of holiday pay during the parties' 1992-1994 contract. More specifically, Complainant Association contends that employes are entitled to holiday pay under the following provision without regard to whether they worked the days immediately prior to and after the holiday

> C. Paid holidays in the school calendar will be Memorial Day, Thanksgiving and Labor Day.

Complainant Association also filed a contractual grievance alleging violation of contract as to the holiday pay issue which was pending before an arbitrator when the complaint was filed.

Respondent District moved to defer the complaint to grievance arbitration but was unwilling to waive its objection that the grievance was untimely filed.

THE EXAMINER'S DECISION

The Examiner held in pertinent part

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> 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/
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> 6/ Brown County, supra.
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> Moreover the Commission has set forth the following criteria in deciding whether it is appropriate to exercise its jurisdiction:
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> (1) the parties must be willing to arbitrate and renounce technical objection which would prevent a decision on the merits by the

arbitrator;

(2) the collective bargaining agreement must clearly address itself to the dispute; and

(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/ Further-more, 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 the Examiner's decision on the merits." 9/ While the

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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. (sic) Dec. No. 25917-C (WERC, 10/89).

9/ Brown County at p. 13.

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 (sic) which are embodied in the provisions of said agreement, or where bargaining on such matters 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.

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).

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 (sic) 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 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 (sic) 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.

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, (sic) Dec. Nos. 23075-C, 23076-C (sic) (WERC, 7/86).

POSITIONS OF THE PARTIES

The District

The District contends the Examiner erred by asserting Commission jurisdiction over Complainant's refusal to bargain claim. The District argues the Examiner should have deferred the refusal to bargain allegation to the parties' contractual grievance arbitration procedure. The District claims deferral was appropriate even though it was unwilling to renounce its objection that the Association's breach of contract grievance was untimely.

The District argues that it is contrary to sound labor-management relations to require renunciation of a timeliness defense as a condition of deferral. It asserts the Examiner's decision not to defer effectively erases the parties' contractual agreement as to the timelines for filing grievances.

The District urges the Commission to alter its existing deferral policy so as to allow retention of timeliness defenses. It asserts the Commission should conclude the Association gave up its right to pursue statutory violations in a prohibited practice forum when it agreed to a final and binding arbitration provision. The District contends the existing Commission deferral policy guarantees a hearing on the merits even where a grievance is untimely filed.

Should the Commission conclude the Examiner's resolution of the deferral issue was correct, the District urges the Commission to affirm the Examiner's dismissal of the merits of Complainant's refusal to bargain allegation. In this regard, Respondent argues the Association waived its right to bargain over

the holiday pay eligibility issue. The District contends that prior to bargaining the 1992-1994 contract, the Association knew or should have known the District's holiday pay practice included eligibility requirements. When the Association could have but did not propose modification of the District's eligibility practice when it successfully sought inclusion of three paid holidays in the 1992-1994 contract, the District argues the Association waived its right to bargain over existing eligibility practices for the duration of the contract.

The District further asserts that its conduct was consistent with its contractual right to establish reasonable work rules. It argues that its eligibility requirements qualify as a reasonable work rule which confirms existing practice and does not conflict with any other existing contract provision.

Given the foregoing, the District asks the Commission to affirm the Examiner's dismissal of the complaint.

The Association

The Association urges the Commission to affirm the Examiner's decision not to defer the refusal to bargain complaint to the grievance arbitration process. It argues the District is wrongly relying upon doctrines applicable to breach of contract complaint allegations.

Applying deferral standards applicable to refusal to bargain allegations, the Association contends the District has failed to establish that any of three requisite deferral standards are met. As correctly determined by the Examiner, the District is unwilling to renounce procedural objections which would allow the contractual issue raised by the grievance to be resolved on its merits. Secondly, the Association asserts the collective bargaining agreement does not address the eligibility dispute and will not provide an adequate remedy for all affected employes. Thirdly, the Association contends important issues of law and policy are present in this case given Respondent's effort to reverse existing Commission policy.

Turning to the merits of the refusal to bargain issue, the Association argues the Examiner erred by concluding the Association had waived the right to bargain over the holiday pay issue. The Association asserts it did not know about the District's eligibility policy and thus could hardly have been expected to bargain over same. A finding of waiver by inaction requires a showing that the Association had clear notice of the District policy and failed to take advantage of a resultant opportunity to bargain. Here, the Association was never notified and too few employes were affected for knowledge to be imputed to the Association.

The Association contends that if the Examiner is affirmed, employers will be able to obliterate bargained contractual rights through imposition of management policy. Citing St. Croix Falls School District, Dec. No. 27215-D (WERC, 7/93) aff'd Dec. No. 93 CV 301 (Cir.Ct. Polk, 2/94), appeal pending, the Association urges the Commission to confirm that the contractual management right to establish reasonable work rules cannot be used to negate existing contractual rights.

DISCUSSION

The Deferral Issue

In Brown County, Dec. No. 19314-B (WERC, 6/83) the Commission discussed the deferral principals which are dispositive here as follows:

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> The Commission has previously stated that Sec. 111.70(3)(a)4 refusal to bargain allegations will be deferred to the contract grievance arbitration forum in appropriate cases 6/ in which the Respondent objects to the Commission exercise of jurisdiction in the
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> 6/ Menomonie Schools, 16724-B (1/81) at 5-6. See also Milwaukee Schools, 11330-B (6/73) at 17.
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> matter. 7/ Such deferral advances the statutory purpose of encouraging voluntary agreements 8/ by not under-cutting the method of dispute resolution agreed upon by the parties in their collective bargaining agreement. Indeed, if the Commission were to indiscriminately hear and decide every claim that a party's alleged deviation from a contractually specified standard is an unlawful unilateral change refusal to bargain, it would undermine the Commission's longstanding policy of ordinarily refusing to exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction absent exhaustion of contractual grievance procedures.
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> In sum, because Respondent has consistently urged WERC deferral of the disputed claim of unlawful unilateral change in overtime assignment procedures to the contract grievance arbitration procedure and because there is a substantial probability that submission of the merits of that dispute to that arbitral forum will resolve the claim in a manner not repugnant to MERA, deferral is appropriate in this aspect of the case. 9/ (emphasis in original)
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> 7/ Compare with the statements referenced in the preceding footnote cases in which the Commission was not urged to defer and did not do so: e.g., Nicolet Union High School, 12073-C (10/75).
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> 8/ Section 111.70(6), Declaration of Policy.
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> 9/ By contrast, it was appropriate that the Examiner reached the merits of the other refusal to bargain allegations in the case rather than deferring. For those allegations required a bargaining unit clarification determination and involved a request for an order that Respondent County bargain with Complainant about special deputies' wages, hours and conditions of employment. Such represent-ation issues and remedies would be, in our view, sufficiently

> less likely to be resolved compat-ibly with MERA in an arbitration proceeding to warrant non-deferral. Representation issues and bargaining orders are much less the grist of the arbitral mill than the claimed change in overtime policy discussed above. Hence, we do not disturb the Examiner's resolution of these other issues and would not have deferred these matters even if they had been the subject of a petition for review herein.
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> 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 the Examiner's decision on the merits. For, the Commission's discretionary decision to defer -- for probable resolution via contractual procedures -- alleged non-contractual violations of the Statutes it enforces ought not and does not preclude the Commission from fully adjudicating such claims if they are not resolved on the merits in a fair and timely fashion and in a manner not repugnant to the Act. 10/ (emphasis added)

10/ Milwaukee Elks, 7753 (10/66); Milwaukee Schools (Vrsata), 10663-A (3/72); Milwaukee Schools, 11330-B (6/73).

Here, because the District refuses to waive its timeliness defense, our holding in Brown County renders deferral inappropriate. Thus, we have affirmed the Examiner's denial of the District's deferral motion.

The District invites us to abandon Brown County and to conclude that deferral is appropriate even if the arbitrator never addresses the question of whether employer conduct is consistent with or violates existing substantive contractual provisions. We decline the District's invitation. We have the statutory jurisdiction and obligation to decide Sec. 111.70(3)(a)4 complaints that employer conduct during a contract breached the employer's duty to bargain. When an employer defends against such allegations by alleging that existing contractual provisions establish that it has met its duty to bargain, interpretation of said contract provisions has the potential to resolve the merits of the refusal to bargain complaint. Thus, where grievance arbitration is available to interpret the critical contract provisions and it is otherwise appropriate, we allow deferral of the dispute to the parties' contractual dispute resolution mechanism. However, consistent with our overriding statutory jurisdiction and obligation, even where we defer we retain jurisdiction over the complaint so that all are assured the merits of the statutory claim can be resolved if deferral does not produce a fair and timely resolution which is consistent with the Municipal Employment Relations Act.

As the foregoing indicates, it is the interpretation of the substantive contract provisions by a grievance arbitrator which gives deferral its utility. Absent such an interpretation, the merits of the employer's defense to the refusal to bargain complaint remain unresolved. Deferral is of no value unless interpretation of the substantive provisions occurs. Thus, we will not defer where, as here, the procedural defense of timeliness makes it speculative that

the interpretation of the holiday and any other relevant contractual clauses will occur.

Refusal to Bargain

As correctly recited by the Examiner, a municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language.

In our view, the analytical focal point in this case is not the issue of waiver but rather the question of whether employe eligibility for holiday pay is a matter already covered by the contract. In this regard, we find the analysis in Janesville Schools, Dec. No. 15590-A (Davis, 1/78) aff'd by operation of law (WERC, 2/78) to be on point.

In Janesville a dispute arose during the contract to whether the employer was obligated to bargain over the right of an employe to accrued vacation benefits upon termination. The Examiner held:

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> The Examiner finds it unnecessary to determine whether the issue in question is a mandatory subject of bargaining because it is concluded that the parties' collective bargaining agreement does in fact embody the subject of a terminating employe's vacation rights or the lack thereof. Although the record clearly indicates that the parties have never specifically discussed said subject, they have bargained a vacation clause which, in conjunction with other possibly relevant contractual provisions, completely defines an employe's rights or lack thereof to vacation benefits. Although the bargaining agreement does not explicitly focus upon a terminating employe's right to accrued vacation benefits or a myriad of other potential vacation issues which could arise during the term of the agreement, its terms and provisions are nonetheless capable of resolving all such issues. To conclude that the bargaining agreement is silent on the subject because it does not explicitly focus upon said issue would be to ignore the fact that a contract cannot possibly deal specifically with all the potential problems which are generated in an employer-employe relationship. Yet, despite the fact that it cannot be all-inclusive, the bargaining agreement is capable, through interpretation, of defining the parties' rights in virtually all areas including that at issue herein. Having therefore concluded that the subject of the vacation rights of terminating employes is in fact embodied in the existing bargaining agreement, it is concluded that Respondents do not have a duty to bargain with respect thereto.
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> In reaching the foregoing conclusion and resolving the statutory issue raised by the complaint, it has not been necessary for the Examiner to define what contractual rights, if any, an employe has to

> accrued vacation benefits upon termination. Given the absence of any evidence that the parties wished to have that contractual question resolved in the instant proceeding, this question will remain potential grist for the arbitral mill.

Applying Janesville here, we conclude that the existing contract defines employes' rights to holiday pay. Although the parties did not specifically discuss the eligibility issue at the heart of the instant dispute, they do have a holiday pay provision. That provision, when read in conjunction with the rest of the contract, defines employes' holiday pay rights. As was true in Janesville, that conclusion ends the inquiry we need to make to resolve the duty to bargain issue. The parties have bargained on holiday pay and are not obligated to bargain further on the issue. The scope of the parties' rights under their bargain need not be defined here and are appropriately left to the grievance arbitration process. 2/

Given the foregoing, we have affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 23rd day of June, 1994.

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

2/ We note that if Complainant had filed a statutory breach of contract claim over the holiday pay issue, we also would have concluded that the contractual grievance arbitration process was the appropriate forum for definition of the parties' respective holiday pay rights. See generally Monona Grove School District, Dec. No. 22414 (WERC, 3/85) at p. 6.