STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUNAKEE TEACHERS ASSOCIATION, Complainant, vs. WAUNAKEE COMMUNITY SCHOOL DISTRICT and KARL MARQUARDT, in his capacity as President of the School Board and Member of the District's Bargaining Committee, Respondents.	Case 12 No. 49786 MP-2790 Decision No. 27837-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, and Ms. Chris Galinat, Associate Counsel, on the brief, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant.

Axley Brynelson, Attorneys at Law, by Mr. Michael Westcott, 2 East Mifflin Street, P. O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Waunakee Teachers Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission on September 9, 1993, alleging that Waunakee Community School District and Karl Marquardt engaged in bad faith bargaining when Marquardt, a member of the Board's bargaining committee, advocated against a tentative agreement and then voted against ratification of same. The Commission appointed Raleigh Jones to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Waunakee, Wisconsin, on November 18 and December 15, 1993, at which time the parties were given full opportunity to present their evidence and arguments. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed March 18, 1994. The Examiner has considered the evidence and arguments of the parties, and now makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Waunakee Teachers Association, hereinafter referred to as the Association, is a labor organization with its offices located at Capital Area UniServ North, 4800 Ivywood Trail, McFarland, Wisconsin 53558.

2. Waunakee Community School District, hereinafter referred to as the District, is a municipal employer with its offices located at 101 School Drive, Waunakee, Wisconsin 53597.

3. The District's teachers and counselors are represented by the Association for purposes of collective bargaining. The District and Association have been parties to a number of successive collective bargaining agreements.

4. The most recent round of collective bargaining sessions commenced

in the spring of 1993. The members of the District's bargaining team were Mike Adler, Steve Kraus, Karl Marquardt and Gene Hamele. At all times material herein, Adler, Kraus and Marquardt were members of the Waunakee School Board and served on its personnel committee. Marquardt also served as Board president. Hamele is the District's Superintendent.

5. At the onset of negotiations, the parties agreed upon ground rules. One such ground rule provided as follows:

> As negotiations proceed, the Board of Education and the Waunakee Teacher's Association spokespersons shall sign agreed upon initial (sic) items. These items shall become part of the new master agreement once the total document is approved by both parties. Both parties may agree to implement individual agreed upon items earlier by formal action of both parties.

The purpose of this ground rule was to avoid confusion regarding the specific language when a complete agreement was reached. When the parties set their ground rules, they did not discuss what would happen if a bargaining team member was absent when a tentative agreement was reached. Both parties understood that before a final contract was reached, each side had to ratify the final tentative agreement.

6. Each bargaining team designated a spokesperson. One of the parties' ground rules was that the spokesperson was the only person to speak for their side on the substance of bargaining proposals. Although not a voting member of the District's bargaining team, Hamele was the District's spokesperson. Carol Bleifield was the Association's spokesperson. Hamele and Bleifield were the only persons who initialed individual items as they were agreed upon.

7. The first bargaining session at which a specific salary and benefit proposal was submitted by either side was on June 1, 1993. On that date, the Association made a one-year package proposal. In it, Association proposals #14, #16, #17, #18, #20 and #23 were tied to a 4.5 percent total package increase, with the Association to determine how the specific dollars would be allocated. Hamele's response to the Association's proposal was that a 4.5 percent total package might be acceptable, but that a one-year contract was not; the District wanted a two-year contract.

8. The next bargaining session was on June 23, 1993. All members of the District team were present. During that meeting the Association made another total package proposal. Part of that proposal was a 4.5 percent total package increase for each of two years. Another part of that proposal was a 9,500 point longevity step which was proposed for the first time. This was a proposal to add an additional top step to the salary schedule. Another part of the proposal involved supervisory duties. The latter two proposals in the package were unacceptable to the District, so it rejected the Association's package proposal. Hamele then indicated that if the Association were to drop their extra longevity step and the supervisory matter, there would be an agreement. Marquardt made no comment about Hamele's statement. Bleifield responded to Hamele that the Association wanted to take some time to consider this offer.

9. At the end of the June 23, 1993 meeting, a discussion occurred regarding the scheduling of the next meeting. Several negotiators, including Marquardt, indicated they could not attend the next meeting if it was scheduled for June 29, 1993, a date that was being considered. The negotiators decided to go ahead and schedule the meeting for that date anyway, even though some negotiators would not be in attendance.

10. The next bargaining session was on June 29, 1993. Marquardt was not present. The session was short, lasting about 35 minutes. At the outset, the Association dropped their 9,500 point proposal and their supervisory duty proposal. The District then made a total package proposal. Part of that proposal was a 4.5 percent total package increase for each of two years. The salary provision in this package did not differ from what the Association offered the District on June 23, 1993. After a caucus, Bleifield informed the District's negotiators that the Association accepted the District's package proposal. There was no discussion during this meeting about the salary portion of the package. Bleifield and Hamele then signed off on the tentative agreement. Afterwards, they discussed when the tentative agreement would be voted upon by each side. They decided that both sides would hold their ratification vote on the day school started, August 23, 1993.

11. Marquardt learned of the settlement when he received a copy of the Board of Education's minutes from the June 29, 1993 bargaining session. He also heard about the tentative agreement when the Board met on July 12, 1993, and Kraus informed the Board of it. The Board neither discussed nor voted on the tentative agreement at that meeting. Marquardt did not voice any opposition to the tentative agreement at that meeting.

12. The Board discussed the tentative agreement in closed session at a Board meeting on August 9, 1993. During the meeting Marquardt voiced opposition to the tentative agreement. This was the first time Marquardt told fellow Board members, including Kraus and Adler, that he opposed the tentative agreement.

13. On August 18, 1993, Marquardt sent the following memo to the other Board members in which he commented on the tentative agreement, stated his opposition to it and urged them to reject it:

> SUBJECT: 3.8% vs. 4.5% Increase in Financial Package Under WTA Contract
>
> I would like to share with you my thinking on the above subject prior to voting on the tentative agreement with WTA at the board meeting on 8/23/93.

For many years the citizens of this state and the Waunakee School District have pleaded with their elected state and local representatives for property tax relief. This school board and most other boards in the state used the state's binding arbitration law as an "alibi" for granting economic packages to their employees in excess of the increase in the CPI. The explanation for this was that other districts settled for higher percentages and therefore we had to as well, or we would lose in arbitration on the issue of comparables with other districts in the area or conference. For example, our settlement for the 1991-92 contract was 6.25% and the CPI was 3.1%. We went to arbitration for the 1992-93 contract, but agreed to settle through mediation before the issue went to an arbitrator. The mediated 1992-93 settlement (6.47%) was also in excess of the 1992 CPI (2.9%). I don't recall the exact percentages, but prior contract settlements for the last decade and contract negotiations were driven by the same logic and resulted in economic increases which exceeded the CPI.

Under the recently passed state budget bill, we no longer have the binding arbitration law on which to "hang our hat" as justification for a settlement in excess of the CPI, and one which is greater than the statutorily defined "qualified economic offer" of 3.8%. I am mindful of the argument that the 3.8% limit in salary and fringe benefits may not be considered a cost control, since it is an amendment to the med-arb law. However, I think we are playing word games if we say the 3.8% was not intended to be a limit on teacher salary increases. To illustrate this, I would like to bring to your attention the language used by WASB in its August 11, 1993 "Legislative Letter". The third sentence in the third paragraph on page 1 states "The reforms require a temporary 3.8 percent CAP (emphasis supplied) on teacher total compensation." This statement and others of a similar nature appearing in the news media as well as other WASB publications, is indicative of legislative intent to give property tax relief. Although not a property tax freeze or a property tax rate freeze, it is nevertheless a significant effort by the legislature and the governor to give some relief to overburdened property tax payers. I ask your serious consideration to follow not only the letter of the law in regard to how the budget bill affects our negotiations with WTA, but the spirit of the law as well. Simply because we will receive $200,000 more in state aid than we expected and because we budgeted an amount for a 5% salary increase, is not justification for a 4.5% increase, in light of 1993 Wis. Act 16, and more importantly in light of the 1993 annualized CPI through July of 0.8%.

It has been suggested that we would have to go to arbitration on other provisions of a contract with WTA if we only offer 3.8% (a qualified economic offer). That is a possibility but is not a given. Even if we did, only non-economic issues would be subject to

> binding arbitration. The term "economic issue" is defined in the budget bill and is more than salary and fringe benefits. It means any issue that creates a new or increased financial liability upon the employer. I think we have an opportunity under both the letter and the spirit of the law to respond to the concerns of citizens about high property taxes, which all of us have heard for years, and still maintain the excellent quality of education in the Waunakee School District.
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> In my comments at the August 9 board meeting, I said the BOE has the support of the community, but that we need to keep that support, particularly for the future when we come to them with a new school referendum, as we undoubtedly will. Let's not vote in a manner which would jeopardize the success of a future building referendum.
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> Thank you for your thoughtful consideration of these comments. I hope we have the intestinal fortitude to act favorably on them on Monday night.
>
> cc: Gene Hamele

14. On August 23, 1993, Marquardt addressed the District's faculty in his capacity as Board president concerning the start of the new school year. During his remarks he did not comment on the tentative agreement or voice opposition thereto. Later that day the Association met and ratified the tentative agreement reached on June 29, 1993.

15. That evening, a special board meeting was held to vote on the tentative agreement reached on June 29, 1993. All board members were in attendance, including Marquardt. During the meeting both Adler and Kraus recommended ratification of the tentative agreement. Marquardt expressed his opposition to the tentative agreement for the reasons mentioned in his memo. The Association did not know Marquardt opposed the tentative agreement until he spoke against it at this board meeting. When the vote was taken it was four to three against ratification of the tentative agreement. Adler and Kraus, along with Bernard Kennedy, voted in favor of the agreement. Marquardt and three others voted against the agreement. By recommending and voting for ratification of the tentative agreement, Adler and Kraus fulfilled the District's obligation to bargain collectively with the Association.

16. Following the board meeting, there was another meeting between the two bargaining committees. At that meeting the parties agreed to implement the tentative agreement with the exception of the salary provision.

17. Marquardt never indicated on June 23, 1993, that he would vote in favor of whatever was agreed to in his absence on June 29, 1993. Prior to the June 29, 1993 meeting, Marquardt did not give any member of the District's bargaining team authority to agree to anything on his behalf. Marquardt was not called or consulted by the District's bargaining team on June 29, 1993, with respect to any proposals that were being made or considered. When the parties reached a tentative agreement on June 29, 1993, no representations were made by the District's bargaining team to the Association's bargaining team that the agreement was acceptable to Marquardt. Since Marquardt was not present when the tentative agreement was reached on June 29, 1993, he was not obligated to support it and vote in favor of ratifying said tentative agreement.

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

CONCLUSION OF LAW

Given the fact that District bargaining team member Marquardt was not present when a tentative agreement was reached with the Association on June 29, 1993, he was not obligated to support it and vote in favor of ratifying same. Consequently, his opposition to and vote against said tentative agreement did not constitute bad faith bargaining. The District therefore did not violate Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats., by Marquardt's conduct.

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

ORDER 1/

The Association's complaint of prohibited practices is dismissed.

Dated at Madison, Wisconsin, this 26th day of April, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, 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

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1/ (See footnote on Page 7.)

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).

WAUNAKEE COMMUNITY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Association alleged that the District and Marquardt violated Sec. 111.70(3)(a)4, Stats., when Marquardt, a member of the District's bargaining team, spoke against and voted against ratification of a tentative agreement reached in his absence. At the hearing the Association amended its complaint to also allege that these same facts constituted a derivative violation of Sec. 111.70(3)(a)1, Stats. The District and Marquardt deny Marquardt's conduct constituted a prohibited practice.

POSITIONS OF THE PARTIES

Complainant Association

The Association notes at the outset that it reached a tentative agreement with the District on June 29, 1993, for a successor labor agreement and that District bargaining team member Marquardt subsequently refused to recommend ratification of the tentative agreement and instead lobbied and voted against it. In its view, this constituted a prohibited practice. To support this premise the Association relies on Commission case law which has established that it is a prohibited practice for an employer's negotiating team to fail to recommend and support ratification of a tentative agreement reached in bargaining. The Association contends it made no difference, legally speaking, that Marquardt was absent from the bargaining session in which the parties reached this agreement. The Association submits there is no Commission case

law establishing that a bargaining team member must be physically present in order to be bound by a tentative agreement.

According to the Association, the Board's bargaining team was authorized to act on Marquardt's behalf in his absence. The premise for this contention is that Marquardt is bound by the committee members' agreement under the doctrine of apparent authority which provides that a party may be bound by the actions and representations of their agent. The Association submits that when District spokesperson Hamele said there was a tentative agreement at the June 29th session, he spoke for all the Board's bargaining team members, including the absent Marquardt. The Association argues that Hamele had both actual and apparent authority to act for Marquardt since he (Hamele) was the District's designated spokesperson. The Association contends that if a bargaining team member authorizes a spokesperson to represent him and then changes his mind, that bargaining team member has a legal duty to inform the other bargaining team members that the spokesperson no longer represents him. It submits that did not happen here, so the bargaining team member who failed to give notice (Marquardt) must be bound by Hamele's commitment to the Association.

The Association also asserts that Marquardt's conduct prior to the June 29 agreement indicated his concurrence with the proposals and terms that were eventually agreed upon (i.e., a 4.5 percent economic increase for each of two years). It notes in this regard that Marquardt never objected to the 4.5 percent package at the June 23rd session, nor did he object to the fact that he would not be at the June 29th session. The Association therefore argues Marquardt was bound by both his course of conduct and his silence to the tentative agreement reached June 29, 1993.

The Association argues that Marquardt's silence and subsequent opposition to this agreement constituted bad faith bargaining whether he had always opposed the Board's 4.5 percent package proposal but kept silent or whether he had a belated change of heart about the economic increase after the tentative agreement was reached. The Association further submits that Marquardt's reason for opposing the tentative agreement was not a bona fide reason.

Finally, it contends the Respondents' constitutional concerns are unfounded. It argues Marquardt's First Amendment rights do not shield his conduct because that conduct violates MERA.

As a remedy for this alleged prohibited practice, the Association asks that the District be ordered to approve, adopt and execute the June 29, 1993 tentative agreement. In its view, justice will not be served if the Examiner enters a bargaining order, an order requiring the Board to consider the agreement at a public meeting and to act in accordance with MERA, or an order requiring Marquardt to recommend and vote for the ratification of the tentative agreement. In fashioning a remedy, the Association calls the Examiner's attention to the attachment to their brief which contained the "declarations of (Board) candidacy." It asks the Examiner to take judicial notice of those documents which show that Kraus (one of the Board's bargaining team members) declined to run for re-election to the Board. The Association speculates that in Kraus' absence, the tentative agreement might not be ratified if the Examiner simply orders the Board to vote again. It therefore contends that the only effective remedy is an order requiring the Board to adopt the June 29, 1993 tentative agreement.

Respondents' District and Marquardt

It is the Respondents' position that it did not commit a prohibited practice by its conduct here. In its view, the applicable case law interpreting MERA establishes that only bargaining team members who are present and agree to a tentative agreement are required to support and recommend the agreement. It relies on Lincoln County 2/ to support this contention. It notes that here, though, Marquardt was not present when the tentative agreement was reached. It therefore submits that Marquardt could legally voice objection to the tentative

2/ Decision No. 23671-A (Shaw, 12/86), aff'd by operation of law, Dec. No. 23671-B (WERC, 1/87).

agreement and vote against it. It argues that a finding that an absentee bargaining team member is bound by the decisions of his or her fellow bargaining team members is contrary to existing law, is not logical and is not sound policy from a public sector bargaining perspective.

The Respondents submit that when the tentative agreement was reached on June 29, 1993, the Association had the representation of those individuals present that the matter was tentatively agreed to. It acknowledges that those individuals were obligated to recommend and support the tentative agreement. It notes that they did--both Adler and Kraus recommended and supported the tentative agreement.

The Respondents further contend that the fact that the parties agreed to meet on June 29, 1993, in the absence of some members should be seen for what it was -- an effort to expedite the process. It contends that the fact that Marquardt agreed to allow the parties to meet in his absence was not a waiver of his right to support or not support a proposed tentative agreement reached in his absence without some specific averment to this effect. It asserts that one should not be forced, in effect, to agree to something simply because he or she was not present when it was discussed. In its view, the record demonstrates that on June 23, 1993, there were no discussions that can be fairly construed as acquiescence by Marquardt to everything that may have been tentatively agreed to by the District's bargaining team on June 29, 1993.

Next, the Respondents contend that the Association's reliance on common-law agency and apparent authority is misplaced. In support of this premise, it contends that the law of agency has traditionally been applied to the commercial sector (i.e. private sector labor regulations) where owners delegate operational responsibilities to management through an agency relationship. It contends that in the public sector though, the duty to act on behalf of the public interest cannot be delegated because public sector bargaining committee members are elected officials. It argues that the facts herein do not show that the District ever pledged the votes of elected officials (i.e. the Board members) to whatever position was taken by their appointed administrator (i.e. Hamele). That being so, it submits that the District never agreed that Hamele had the authority to bind Marquardt.

The Respondents also assert that Marquardt's memorandum to board members, speech and vote in opposition to ratification of the proposed agreement was protected speech under the First Amendment to the United States Constitution. It submits that Marquardt enjoys a First Amendment right to vote his conscience. In its view, if an absentee member of a bargaining team, in the absence of previous agreement to the contrary, can be effectively stripped of his or her right to speak out against or to vote against a proposal that he or she never agreed to, serious First Amendment implications will result. It argues this is not the intent or policy behind MERA. It therefore requests that the complaint be dismissed.

The Respondents argue in the alternative that if Marquardt's failure to recommend and support a tentative agreement that he never agreed to was a prohibited practice, the appropriate remedy would be a cease and desist order. It contends that the relief requested by the Association (i.e., an order to adopt the tentative agreement reached June 29) is inappropriate under the circumstances and not the typical remedy in a case involving refusal to recommend and support a tentative agreement. It also argues that a so-called Whitehall remedy would, under the facts of the instant case, violate the constitutional rights of the Board members because it would deprive them of their rights and obligations to vote on matters of public concern as they determine appropriate. Finally, it contends the Examiner should not take judicial notice of the "declarations of (Board) candidacy" which were attached

to the Association's brief on the grounds that those documents were offered in an untimely fashion.

DISCUSSION

The parties reached a tentative agreement on a successor bargaining agreement on June 29, 1993. When this happened, two members of the Board's bargaining team were present (Kraus and Adler). The other member of the Board's bargaining team (Marquardt) was absent when the tentative agreement was reached. Kraus and Adler later recommended and voted for ratification of the tentative agreement, while Marquardt did not. Marquardt was the only person on the Board's bargaining team who did not recommend and vote for the tentative agreement.

Prior Commission case law has established the general proposition that the duty to bargain in good faith requires the employer's negotiating team to recommend and support approval and ratification of tentative agreements reached in collective bargaining. 3/ Failure to do so constitutes a refusal to bargain which is a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 1, Stats. 4/

In the cases just cited, bargaining team members who failed to support a tentative agreement were present at the bargaining table when the tentative agreement was reached. As just noted though, the bargaining team member who failed to support the tentative agreement here (Marquardt) was not present when the tentative agreement was reached. At issue is whether this matters. This case therefore addresses whether the aforementioned obligation to recommend and support a tentative agreement applies to a bargaining team member who was not present when a tentative agreement was reached. Said another way, must a bargaining team member support, recommend and vote for a tentative agreement that was reached in his or her absence?

3/ Oconto County, Dec. No. 26289-A (Gratz, 7/90), aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90); Florence County, Dec. No. 13896-A (McGilligan, 4/76), aff'd by operation of law, Dec. No. 13896-B (WERC, 5/76); and Jt. School District No. 5, City of Whitehall, Dec. No. 10812-A (Torosian, 9/73), aff'd, Dec. No. 10812-B (WERC, 12/73).

4/ Ibid.

Insofar as the Examiner can determine, there is no Commission case law holding that a bargaining team member who is absent when a tentative agreement is reached has the same legal obligation to recommend and support the tentative agreement as the bargaining team members who are present. There are several decisions though which come close to saying just the opposite. In Adams County 5/ the pertinent facts are that the chairman of the personnel committee (a member of the employer's bargaining team) was not present in negotiations on the date a tentative agreement was reached. He later voted against the tentative agreement. The examiner found "no impropriety" in his vote against ratification of the tentative agreement. The basis for this finding was that there was "no showing that the other members of the Personnel Committee were empowered to bind the chairman." 6/ Lincoln County 7/ also addressed the matter of individuals voting against a tentative agreement reached in bargaining. There, the employer's ratification process required action by several different committees. The pertinent facts are that some committee members who were not at the bargaining table when the tentative agreement was reached initially supported the tentative agreement in a preliminary vote but voted against the tentative agreement in a subsequent vote. The examiner found it was not bad faith bargaining for committee members who were not present when the tentative agreement was reached to fail to support the tentative agreement. In so finding, the examiner noted that the Florence County decision cited earlier was not dispositive therein because "that case was premised on the obligation of the municipal employer's representatives at the table to support and recommend the tentative agreement reached at the bargaining table" (emphasis in original). 8/ While the phrase "at the table" was not defined in the decision, this Examiner reads it to mean physically present at the bargaining table. In Lincoln County, the employer's representatives who failed to support the tentative agreement were not physically present "at the table."

Although the above-noted decisions are not directly on point, they are nonetheless instructive because both addressed situations, like the one present here, where certain individuals were not present when a tentative agreement was reached. The end result in both cases was that those individuals who were not present at the bargaining table when the tentative agreement was reached were not required to recommend and support same. In other words, they were not bound by the same obligations as those who were present when the agreement was reached. In the Examiner's opinion, this result seems only logical. After all, why should someone be forced to agree to something if he or she was not present when an agreement was reached? In the context of labor negotiations, why should a bargaining team member who was absent from the bargaining table when an agreement was reached be considered to have automatically approved of the tentative agreement? This Examiner is unwilling to simply apply a presumption

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5/ Decision No. 11307-A (Schurke, 4/73), aff'd, Dec. No. 11307-B (WERC, 5/73).

6/ Adams County, at p. 10.

7/ Supra, footnote 2.

8/ Lincoln County at p. 12.

that the absent bargaining team member approves of the tentative agreement reached in his or her absence. Instead, this Examiner believes that before approval of the tentative agreement can be imposed on an absent bargaining team member there must be an affirmation of the tentative agreement by the absent bargaining team member. Thus, if the absent bargaining team member later agrees to the tentative agreement reached in his or her absence, then he or she has the same legal obligation to recommend or support it as those bargaining team members who were present when the tentative agreement was reached. However, if the absent bargaining team member does not agree to the tentative agreement reached in his or her absence, then he or she does not have a legal obligation to recommend or support same.

The Examiner finds that Marquardt did not say or do anything in bargaining prior to June 29, 1993, that could be construed as a representation or affirmation he would support any tentative agreement reached in his absence. Insofar as the record shows, Marquardt was silent during the face-to-face bargaining sessions. While the Association argues that Marquardt's silence indicated concurrence with the proposals and terms ultimately included in the tentative agreement (i.e. a 4.5 percent economic increase for each of two years), the Examiner is not so persuaded. Marquardt's silence in bargaining can be attributed to one of the parties' negotiating ground rules, namely the one providing that the designated spokesperson was the only person to speak for their side on the substance of bargaining proposals. Here, Marquardt was not the District's spokesperson, Hamele was, so Marquardt's silence during bargaining is understandable on that basis alone. That being so, Marquardt's silence during bargaining does not prove that he concurred with a 4.5 percent economic increase for the teachers, nor can such concurrence be inferred. The Examiner further finds that after the tentative agreement was reached on June 29, 1993, Marquardt did not say anything to either fellow Board members or the Association that indicated he approved of the tentative agreement reached in his absence. Since Marquardt never gave any indication that he agreed to or accepted the tentative agreement reached in his absence, it follows that he was not legally obligated to recommend and support same.

The Association nonetheless contends that in this case, the facts militate in favor of imposing on Marquardt and the Board a legal obligation to approve the June 29, 1993 tentative agreement. It makes the following arguments in support thereof.

To begin with, the Association notes that although Marquardt was not at the June 29 meeting where the tentative agreement was reached, he was at the June 23 meeting where Hamele expressed agreement with a proposal that was very similar to what was ultimately agreed upon. Specifically, it notes that Hamele expressed approval of the salary component that was ultimately included in the tentative agreement (i.e. a 4.5 percent economic increase for each of two years). There is no question that the parties came close to reaching agreement on June 23. Had they done so, and Marquardt agreed to it, he certainly would have been obligated to recommend and support approval and ratification of that tentative agreement. However, as the old saw goes, "close only counts in horseshoes." Here, the parties did not reach a final tentative agreement on June 23. The reason no tentative agreement was reached on that date was that

the Association was unwilling to drop two of its proposals that the Employer wanted the Association to drop. While the Association dropped those two proposals at the next meeting held June 29, and a tentative agreement was reached, what matters here is the date the tentative agreement was reached; not the date the parties came close to reaching agreement.

Next, the Association emphasizes that the parties agreed on June 23, 1993, to meet on June 29, 1993, without Marquardt and others in attendance. It is undisputed that when they did so, neither side addressed what effect the absence of a member from either bargaining team would have on any decisions reached. It simply was not discussed. Had either side deemed it important though, they could have raised this question. When Marquardt agreed to let the parties meet and proceed in his absence, he made no public declaration that he would support whatever agreement was reached in his absence on June 29, 1993. Such was his right. Additionally, Marquardt did not tell Hamele or any other Board member prior to that date that they had his (Marquardt's) proxy to vote for him. That being so, it is clear he did not agree in advance to whatever decisions were made at that meeting. As a result, the Examiner finds that Marquardt did not waive his right to support or not support any agreement reached in his absence by agreeing to let the parties meet without him on June 29, 1993.

Finally, the Association contends that Marquardt was bound to the tentative agreement under the doctrine of apparent authority. That doctrine provides that a party may be bound by the actions and representations of their agent. In the context of this case, the Board's agent was Hamele because he acted as the District's spokesperson during negotiations. It is normal practice in negotiations for each side to have a spokesperson who operates as their voice. Spokespersons make the bargaining process more efficient than would be the case if no one from either side was so designated. It is also normal practice in negotiations for a spokesperson to initial tentatively agreed-upon items, as Hamele and Bleifield did. Both spokespersons also signed off on the tentative agreement reached June 29, 1993. However, just because a spokesperson speaks at the table and initials tentatively agreed-upon items does not mean that he or she has the power to make decisions on behalf of his or her team, or to bind all his or her team members. Here, there is nothing in the record to establish that Hamele was so empowered. As a result, on June 29, 1993, Hamele was the voice for the members of the District's bargaining team who were present, namely Kraus and Adler. Hamele was not the voice for Marquardt that day because Marquardt was not present. On June 29, 1993, no one from the District's bargaining team made any representations to the Association's bargaining team that the tentative agreement was acceptable to Marquardt. In fact, the District's bargaining team members did not know what Marquardt's position was concerning the tentative agreement because they did not call or consult with him during the June 29 bargaining session. Additionally, Hamele did not make any representation to the Association's bargaining team on that date that he had the authority to bind Marquardt to the tentative agreement that was reached, or that he was binding Marquardt to support same. That being so, neither Hamele nor anyone else on the District's bargaining team pledged that Marquardt's vote on the tentative agreement would be the same as that of Kraus and Adler, who expressly indicated they supported the tentative agreement.

Given the foregoing, it is held that Marquardt was not bound to recommend and support the tentative agreement reached in his absence June 29, 1993. Inasmuch as he did not have a legal obligation to support the tentative agreement, it was not bad faith bargaining for him to speak against and vote against same. Furthermore, the Examiner is unable to conclude that Marquardt's overall conduct constitutes bad faith bargaining in violation of MERA. He simply decided he could not support the tentative agreement reached in his absence. Marquardt's actions were therefore not violative of Sec. 111.70(3)(a)4, Stats., or derivatively of Sec. 111.70(3)(a)1, Stats. Accordingly, the complaint has been dismissed.

Having so found, the Examiner does not believe it necessary to address any of the Respondents' constitutional arguments. Consequently, no comment is made concerning same.

Dated at Madison, Wisconsin, this 26th day of April, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner