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-B

Appearances:

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

Axley Brynelson, Attorneys at Law, by Mr. Frank J. Bucaida, Mr. Michael Westcott, and Mr. Mark B. Hazelbaker, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, on behalf of the Respondents.

ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

On April 26, 1994, Examiner Raleigh Jones issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter. He concluded Respondents Waunakee Community School District and Karl Marquardt had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., during the ratification process applicable to a tentative collective bargaining agreement between Respondent District and Complainant Waunakee Teachers Association. He therefore dismissed the complaint.

On May 13, 1994, Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received July 18, 1994.

Having reviewed the record, the Examiner's decision, and the positions of the parties on review, we make and issue the following

ORDER 1/

A. Examiner Findings of Fact 1 - 7 are affirmed.

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

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

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law

(footnote 1 continued on page 3)

(footnote 1 continued from page 2)

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.

. . .

(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.

B. Examiner Finding of Fact 8 is modified to read:

> 8. The parties' next bargaining session was held June 23, 1993. All members of the District's bargaining teamn
> were present. Early in the session, the Association made a written total package offer to the District which addressed 32 unresolved Association and District proposals. The District verbally rejected the offer and advised the Association as to the parts of the offer which would be acceptable or unacceptable in the context of a
> agreement. The Association and the District then continued to verbally modify their respective positions as to the issues addressed in the Association's formal proposal. When the session ended, the parties had not initialled any new tentative agreements on unresolved issues but had communicated sufficient flexibility to each other (in the context of an overall agreement) to potentially resolve all issues except supervisory duties, modification of salary schedule, and the starting date of a flexible benefit plan.
>
> As to the supervisory duty issue, the District had advised the Association that the District would drop its proposal if the Association would do the same. The Association was unwilling to drop its proposal.
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> As to the salary schedule issue, the Association was unwilling to drop its proposal to add a step.
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> As to the flexible benefit issue, the parties were proposing different dates when the benefit would begin.

C. Examiner Finding of Fact 9 is affirmed.

D. Examiner Finding of Fact 10 is modified to read:

> 10. The parties' next bargaining session was on June 29, 1993. All members of the District team were present except for Marquardt. Shortly after the meeting began, the District made a written total package offer to the Association which addressed 34 unresolved Association and District proposals. Both parties caucused for ten minutes and then reconvened. The Association then advised the District that it would drop its salary schedule and supervisory proposals. The Board dropped its

supervisory proposal. The Association further agreed to the District's proposed starting date for the flexible benefit package. The Board agreed to an Association request that the Association be able to redistribute the 4.5% total package settlement among the various package components followingfinal adoption of the State of Wisconsin budget. The parties agreed to a revised calendar and modified a prior agreement on premium payments for long term disability insurance.

E. Examiner Findings of Fact 11 - 16 are affirmed.

F. Examiner Finding of Fact 17 is affirmed as modified through the addition of the underlined words.

> 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, did not otherwise participate in the decision to reach a tentative agreement on June 29, 1993, and had not otherwise bound himself or been bound by the District to support the tentative agreement, he was not obligated to support it and vote in favor of ratifying said tentative agreement.

G. Examiner Conclusion of Law is affirmed as modified through the addition of the underlined words and deletion of the lined-through words.

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, did not otherwise participate in the decision to reach a tentative agreement on June 29, 1993, and had not otherwise bound himself or been bound by the District to support the tentative agreement, 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~~ Respondents therefore did not violate Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats., by Marquardt's conduct.

H. Examiner Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of June, 1995.

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

WAUNAKEE COMMUNITY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER
AFFIRMING IN PART AND MODIFYING IN PART
EXAMINER'S FINDINGS OF FACT AND
CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER

THE EXAMINER'S DECISION

The Examiner dismissed the Association's complaint that the District and Marquardt had violated their duty to bargain by failure to appropriately support ratification of a tentative agreement reached with the Association.

In his Memorandum, the Examiner stated:

> 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.
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> 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/

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.

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?

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

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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.

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 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

8/ Lincoln County at p. 12.

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.

POSITIONS OF THE PARTIES

The Association

The Association urges the Commission to reverse the Examiner. In its initial brief, the Association concludes as follows:

Fundamentally, the Examiner's decision ignores the concept of apparent authority. Under the Examiner's view of the duty to bargain in good faith, a principal could never cloak an agent with sufficient authority to bind the principal if the principal is not physically present at the bargaining table. Only actual authority, specifically articulated, would require an absent bargaining team member to recommend and support a tentative agreement reached by the bargaining team's spokesperson. The Examiner's view of the duty to bargain in good faith in this context is not only at odds with well-established case law, but it is also at odds with the underlying policies of the MERA which encourages voluntary settlement through peaceful and predictable procedures of collective bargaining.

There is no justification for Marquardt to sabotage this agreement that is consistent with the duty to bargain in good faith. The Examiner's conclusion that Marquardt's conduct was consistent

with his duty to bargain in good faith is simply wrong.

> The facts are against Marquardt. He was an active and involved participant in the parties' bargaining process. He was present for caucus discussions relating to every single provision in the document that eventually constituted the parties' tentative agreement, including the economic provision upon which he later based his refusal to support the agreement. There is nothing in the June 29, 1993 agreement that Marquardt did not have the opportunity to discuss with his fellow bargaining team members, and to oppose if he disagreed. Throughout the negotiations, Marquardt and the other two bargaining team members, Adler and Kraus, cloaked Hamele with the authority to speak for them in circumstances that made it reasonable for the Association team to conclude that Hamele had the authority to bind the Board's bargaining team to recommend the agreement, regardless of whether Marquardt was physically present on June 29, 1993. Painting Marquardt as a victim who was uninformed, in the dark, and out of the proverbial loop is simply inaccurate and inexcusable.

In reply to the District, the Association urges the Commission to reject the District's claim that the bargaining history surrounding "ground rules" is supportive of the District's position herein. The Association contends the District's team was operating within the scope of authority given them by the entire Board and would only go back to the Board when additional authority was required.

The Association also urges the Commission to reject the District's claims which revolve around the democratic role of an elected official. Indeed, the Association contends that its position is entirely consistent with the Board's political processes. In this regard, the Association notes that a four-member majority of the Board remained to consider the tentative agreement reached by a negotiating team which included three Board members. Hence, the Association notes the majority of the Board members were not bound by the bargaining team's tentative agreement.

The Association also urges the Commission to reject District arguments about the distinctions between private employers and municipal employers and their ability to conduct their business through an agent. The Association contends that municipal employers can chose to cloak an agent with actual or apparent authority to commit the Board through the collective bargaining process.

The Association alleges that there is no existing Commission precedent which compels rejection of its position herein. The Association argues that none of the cases cited by the Examiner

or the District directly address the issue before the Commission in this proceeding.

The Association urges the Commission to reject the District's arguments about Marquardt's constitutional right to free speech. The Association notes the District appears to be arguing that even if Marquardt was duty bound to recommend and support the tentative agreement under the duty to bargain in good faith, the First Amendment relieves him of that obligation. The Association contends the constitutional analysis represented by the cases cited by the District does not support he District's position in that regard. The Association argues that when a board member assumes the duty to bargain in good faith as a member of a negotiation committee, that person is duty-bound to recommend and support a tentative agreement reached in good faith unless that person voices objection in a timely fashion. The Association asserts Marquardt's First Amendment rights did not permit him to violate a statute.

In conclusion, the Association urges the Commission to order the District to ratify the tentative agreement. Citing Joint School District No. 5, City of Whitehall, Dec. No. 10812-A (Torosian, 9/73) aff'd in pertinent part, Dec. No. 10812-B (WERC, 12/73), the Association contends that there is persuasive precedent for the proposition that the only appropriate remedy in this case is to order the Board to approve, adopt and execute the tentative agreement.

The District

The District urges the Commission to affirm the Examiner in all respects. The District argues the Examiner's decision properly considered the differences between private and public sector employers with respect to good faith bargaining. The District contends that the context of public sector collective bargaining presents radically different policy concerns from those which are applicable to the commercial context in which the private sector law of agency has traditionally been applied. The District contends that because it is ultimately the public which controls municipal government, it is legally untenable to rely on private sector agency theories to bind elected officials to vote in a particular fashion. It asserts the power to manage the affairs of the District is vested with the entire School Board and that each bargaining committee member can bind only himself or herself. The District concedes that such a system may not operate as smoothly and mechanistically as the private sector employer model but asserts that this is a necessary accommodation to democratic values and the overriding interest of preserving the public's right to govern itself.

The District further argues that the Association's agency analysis must fail because Marquardt was not the "principal" of the District's spokesperson, Hamele. Instead, the District contends the "principal" was the majority will of the School Board and, indirectly, of the electorate. The District further asserts that the agency analysis must fail because Hamele was not the agent of the Board, only its spokesperson. The District contends that its bargaining committee made it clear from the outset of negotiations that no one, including the bargaining committee, could commit the District. The District argues that the Association's own negotiator understood that Marquardt and other Board members were not bound to vote for the agreement. The District further asserts that the Association's failure to acquire agreement on its ground rules demonstrates the Association's understanding that the Board was not bound to adopt tentative agreements made by its bargaining committee.

The District additionally notes that the Association could not have had any reason to believe Marquardt's colleagues had his proxy to commit him to the agreement. The record further establishes that Marquardt had no knowledge whatsoever of any actions taken by his colleagues which purported to be on his behalf. Further, the District argues it is clear Marquardt never made any specific commitment to support the tentative agreement.

The District contends that Commission precedent supports the Examiner's view that a bargaining team member has no duty to support a tentative agreement reached in his or her absence.

The District further argues that the Examiner's interpretation of the law should be affirmed because it avoids a constitutional violation of Marquardt's rights to free speech. The District contends the Commission is obligated to construe the duty to bargain in a manner which avoids violating Marquardt's constitutional rights. The District asserts that construing the law so as to require Marquardt to vote or speak in a particular fashion would clearly violate the First Amendment.

In conclusion, the District argues that the only decision and remedy consistent with democratic principles is dismissal of the prohibited practice complaint through affirmance of the Examiner.

DISCUSSION

We begin our analysis of this case with the general premise that each side is free to unilaterally determine the ratification obligations of its bargaining team. Like the composition of the team itself, ratification obligations must remain outside the scope of collective bargaining because they are so central to the strategic control each party must have over how it pursues a bargaining agreement.

As this case amply demonstrates, each party is best served by having an explicit understanding as to the ratification obligations of the opposing parties' bargaining team members. Whether this understanding results from the terms of a mutually acceptable agreement or from the unilateral communication of each party to the other (whether in response to a question or simply as a statement of position), the understanding will eliminate the confusion and litigation which otherwise may be present.

Despite the value of an explicit understanding, it is our experience that many parties nonetheless rely on an implicit assumption of ratification obligations. As argued by Complainant, there is a general presumption that when a tentative agreement is reached, all members of the bargaining team that reached the tentative agreement (including elected officials)

are obligated to support and vote for the agreement, absent explicit statements or agreements to the contrary. This presumption has been recognized and applied by the Commission over the years. 2/

It is well-established that when a tentative agreement is presented to a school board for ratification, a school board member who has served on the district's collective bargaining team has the burden of complying with good faith bargaining requirements, including ratification obligations, which may go beyond those applicable to board members not on the district's bargaining team. This is particularly true when a board member who serves in the dual capacity of policy formulator (as a school board member) and policy implementor (as a bargaining team member) may wish to repudiate a tentative bargaining agreement to which he or she was a party. Contrary to the argument urged by the Respondent District, we are not persuaded that this obligation is incompatible with democratic principles, free speech 3/ and the board member's obligation to exercise sound judgment in support of the best interests of the school district.

For it is equally well-established that any board member who serves on the district's bargaining team (or, for that matter, any member of either bargaining team, board member or not) who either opposes or has reservations about any tentative agreement the parties appear to be reaching has only to say so to the other side to preserve a continuing individual right to oppose the tentative agreement at ratification time.

What is not permissible under any circumstances, however, is attack by ambush -- that is, apparent concurrence (express or implied) to the proposed tentative agreement by a

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2/ Joint School District No. 5, City of Whitehall, Dec. No. 10812-A (Torosian, 9/73); aff'd in pertinent part, Dec. No. 10812-B (WERC, 12/73); Hartford Union High School District, Dec. No. 11002-A (Fleischli, 2/79) aff'd in pertinent part, Dec. No. 11002-B (WERC, 9/74); Adams County, Dec. No. 11307-A (Schurke, 4/73) aff'd (WERC, 5/73); Florence County, Dec. No. 13896-A (McGilligan, 4/76) aff'd by operation of law, Dec. No. 13896-B (WERC, 5/76); Joint School District No. 1, Chippewa Falls, Dec. No. 14517-B (Yaeger, 8/76), aff'd by operation of law (WERC, 9/76); City of Green Bay, Dec. No. 21785-A (Roberts, 10/84), aff'd by operation of law, Dec. No. 21785-C (WERC, 11/84); Lincoln County, Dec. No. 23671-A (Shaw, 12/86), aff'd by operation of law, Dec. No. 23671-B (WERC, 1/87); Oconto County, Dec. No. 26289-A (Gratz, 7/90); aff'd by operation of law, Dec. No. 26289-B (WERC, 8/90).

3/ We think it clear that speech which violates state labor law can be appropriately sanctioned through the finding of unfair labor practices and the order of relief to remedy the improper speech. See WERB v. United A.A. & A.I. Workers, 269 Wis. 578 (1955), aff'd auto workers v. Wisconsin Board, 351 U.S. 266 (1956); Layton School of Art & Design V. WERC, 82 Wis. 2d 324 (1978).

bargaining team member who subsequently opposes it at ratification time. Such conduct, of course, serves only to create a bargaining relationship of distrust and chicanery between the parties, and is destructive of collective bargaining.

In our view, this general presumption of ratification obligations does not extend to team members who are not physically present when the tentative agreement is reached, did not participate in the decision to reach agreement, and did not previously bind themselves to support any tentative agreement reached. We reach this conclusion because we believe that only those who participated in the decision to reach a tentative agreement should be bound (absent explicit statements or agreements to the contrary) by their decision. Team members who do not participate in the decision to reach a tentative agreement are functionally no different than members of the bargaining unit or elected officials not on the team. Their lack of participation in the decision-making of the collective bargaining process frees them to vote as they see fit as to contract ratification. Team members who are present when a tentative agreement is reached are presumed to have participated in decision-making and are bound to support the decision. Team members who are physically absent but who nonetheless participated in the decision to reach the tentative agreement, or have given their prior assent to any tentative agreement, or who have been bound by their own team's internal decision-making, are also bound to support and vote for the tentative agreement. However, absent participation, prior assent or binding action by others, we are unwilling to extend ratification obligations to team members who were not physically present when the tentative agreement is reached. We proceed to examine the facts of this case to determine Marquardt's ratification obligations.

Finding of Fact 17 states in pertinent part:

> 17. Marquardt never indicated on June 23, 1993, that he would note 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.

From these facts, we are satisfied that Marquardt did not bind himself to support whatever tentative agreement might be reached on June 29, 1993, and did not participate in the District's June 29th decision to enter into a tentative agreement. Thus, he was not bound to support or vote to ratify the tentative agreement.

The Association argues there are facts other than those recited in Finding 17 which produce a different result. In its brief, the Association specifically identifies the following:

1) Testimony, uncontroverted by Marquardt, that members of the two negotiating teams agreed that it was acceptable to have only the two spokespersons, Hamele and Bleifield, at the negotiating session on June 29 (T. 38-39).

2) Uncontested testimony by an Association team member, that the two teams specifically discussed whether the absence of team members would have any impact on any tentative agreement reached on June 29, 1993. (T. 86). Both sides agreed that absent bargaining team members would not adversely impact on reaching a tentative agreement.

3) Testimony and record evidence that the parties specifically bargained an "escalator/de-escalator clause" designed to take into account then-pending changes in Wisconsin's interest arbitration law in the implementation of the parties' economic package (T. 30, Ex. 10). Accordingly, Marquardt lacked a bona fide reason for not supporting the tentative agreement.

4) Evidence that Hamele and Bleifield only signed off on tentative agreements after caucusing with their respective teams, and that each was authorized to speak for his/her respective bargaining team. (T. 85, Ex. 7-10, 13, 14, 17).

In our view, none of these facts are particularly significant. The acceptability of a meeting between only the two spokespersons reflects the small number of issues which were preventing the parties from reaching a tentative agreement but does not create ratification obligations. As indicated earlier, team members would be obligated to support a tentative agreement reached by the two spokespersons if they had given their prior assent to whatever agreement was reached or had participated (telephonically or otherwise) in the decision-making process June 29th. Absent prior assent or participation, they are not bound.

As to the parties' consensus that their ability to reach a tentative agreement would not be impaired by the absence of bargaining team members, as discussed above, the ability to reach a tentative agreement does not create any particular ratification obligations.

As to whether Marquardt lacked a "bona fide" reason for failing to support the tentative agreement, we note that a "bona fide" reason analysis would only become pertinent herein if we had

concluded Marquardt was obligated to support and to vote to ratify the tentative agreement and the District had asserted that a "bona fide" reason existed to excuse Marquardt from that obligation. See City of Columbus, Dec. No. 27853-B (WERC, 6/95). As Marquardt was not

obligated to support and to vote to ratify the tentative agreement, it is irrelevant whether the "escalator/de-escalator" clause should have been sufficient to resolve Marquardt's concerns about the tentative agreement.

Lastly, as to the Association argument about spokespersons Hamele and Bleifield, we conclude the role and authority of the spokesperson to speak for the team and to sign tentative agreements has no particular relationship to the issue of ratification obligations. While parties could mutually agree or unilaterally obligate themselves to ratify whatever agreements are reached by their spokespersons, no such mutual agreement or unilateral obligation is present here. The role and authority of the spokesperson cited by the Association reflects how the parties chose to structure their communications and agreements at the bargaining table but does not establish ratification obligations.

When considering the role of the spokesperson, we have also considered and rejected the Association's contention that the doctrine of apparent authority bound Marquardt to support the tentative agreement.

Unlike the Metco Products 4/ line of cases relied upon by the Association, the District's spokesperson was not functioning as an agent hired to bargain a contract. He was simply a non-voting spokesperson for the bargaining team. 5/

4/ Metco Product v. NLRB, 884 F. 2d 156 (CA4, 1989).

5/ Both parties have argued as to whether we should or should not be looking to private sector labor law standards when resolving this case. Fundamentally, these arguments miss the mark because they presume that we generally resort to a private sector labor law analysis when interpreting and implementing the Municipal Employment Relations Act. This presumption is inaccurate. The Legislature crafted the Municipal Employment Relations Act to reflect the unique values and interests it felt should govern public sector collective bargaining in Wisconsin. The Legislature created the Wisconsin Employment Relations Commission to interpret and implement the Municipal Employment Relations Act in a manner consistent with the unique values and interests expressed in the statute. Thus, we reach our conclusions as to proper interpretation of the Municipal Employment Relations Act without any particular regard to whether we are acting in a manner which is consistent or inconsistent with a "private sector" analysis under the National Labor Relations Act.

As the Wisconsin Supreme Court held in Milwaukee v. WERC, 71 Wis. 2d 709, 716 (1976),

(footnote 5 continued on page 21)

As to the doctrine of apparent authority set forth in Pamperin v. Trinity Memorial, 144 Wis. 2d 188 (1988), we initially note that our analysis of ratification obligations is premised upon our views as to the duty to bargain in good faith. We are not bound to apply an apparent authority analysis.

However, if we were to apply an apparent authority analysis, we do not think Marquardt would be bound thereby. We again note that the parties' defined the spokespersons' role as communicators only. Further, Marquardt did not know what would occur June 29th. Thus, he did not have knowledge of the acts as to which the Association asserts it relied and as to which it asserts Marquardt should be bound.

In conclusion, it is important to address the Association's contention that the agreement ultimately reached June 29th was essentially the same agreement the Association could have had on June 23rd, and thus that Marquardt (who was present June 23) should be bound to support the June 29th agreement. If a tentative agreement had been reached June 23rd and the District had not advised the Association that Marquardt opposed the tentative agreement, then Marquardt would have been bound to support and to vote to ratify the tentative agreement. In terms of our analysis, he would have participated in the decision to reach a tentative agreement, stated no

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(footnote 5 continued from page 20)

> " ... interpretations of the National Labor Relations Act made by the NLRB are not dispositive of the appropriate construction of our state act. The test is whether the application of the statute as determined by WERC is reasonable and consistent with the purposes of the statute. This is so because the application of MERA is one of the areas of the law requiring expertise."

Thus, by way of example, in Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540 (1967), the Wisconsin Supreme Court affirmed our conclusion that the Municipal Employment Relations Act is violated when an employe is discharged at least in part because of anti-union animus. In Employment Relations Dept. v. WERC, 122 Wis. 2d 132 (1985) the Court reaffirmed the continuing validity of this interpretation of Municipal Employment Relations Act and rejected existing private sector law to the contrary developed under the National Labor Relations Act.

Therefore, we base our decision herein upon the language of the Municipal Employment Relations Act and our expertise in the administration and interpretation of same.

opposition to the agreement to the Association and thus been bound. However, the decision to reach a tentative agreement came on June 29th. Marquardt was not present and did not otherwise participate in that decision. Thus, he was not bound. 6/

6/ Our decision is consistent with existing Commission precedent. In Adams County, Dec. No. 11308-A (Schurke, 4/73) aff'd (WERC, 5/73), one of the issues litigated involved the parties' agreement to separate bargaining over the issue of life insurance coverage from bargaining over all other terms of a successor contract. During bargaining over life insurance, when only four of five employer bargaining team members were present, the parties agreed to a resolution of the life insurance issue which required unanimous support of the employer bargaining team. The absent member and one of the four present members of the employer bargaining team ultimately did not vote to ratify the life insurance agreement.

The Examiner found a duty to bargain violation as to the negative vote of the team member present when the tentative agreement was reached. No violation was found as to the absent team member. The Examiner stated:

> The Chairman of the Personnel Committee was not present during the negotiations on July 11 and was not a participant in the vote on the unanimity proposal then offered by the Union. He voted against the insurance resolution on August 16, 1972. There has been no showing that the other members of the Personnel Committee were empowered to bind the Chairman, and no impropriety is found deriving from his vote at the August 16 meeting.

The Commission adopted the Examiner's decision.

Aside from Adams, none of the Examiner decisions cited by the Respondents (or relied upon by the Examiner) directly raise or resolve the issue litigated by the parties herein.

In Lincoln County, Dec. No. 23671-A (Shaw, 12/86) aff'd by operation of law, Dec. No. 23671-B (WERC, 1/87), and Joint School District No. 1 Chippewa Falls, Dec. No. 14517-B (Yaeger, 8/76) aff'd by operation of law (WERC, 9/76) the dispute was over the ratification obligations of County Board members who were not members of the employer bargaining team which reached a tentative agreement. Thus, neither Lincoln County nor Chippewa Falls are of analytical value herein.

(footnote 6 continued on page 23)

It is also important to note that although the broad outline of the tentative agreement was present on June 23 when Marquardt was in attendance, the June 29 meeting when he was absent produced resolution of several issues which were never resolved under any of the scenarios the parties discussed on June 23. As reflected in our Finding of Fact 10, June 29 produced agreements on a revised calendar, the distribution of the financial package and premium payments for long-term disability which were not present on June 23. Thus, even if we were to conclude that Marquardt was bound by his presence and failure to dissent to the District flexibility discussed on June 23, he would not be bound to support the tentative agreement because new components were added on June 29 when he was not present.

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

Dated at Madison, Wisconsin, this 15th day of June, 1995.

(footnote 6 continued from page 22)

In Florence County, Dec. No. 13896-A (McGilligan, 4/76) aff'd by operation of law, Dec. No. 13896-B (WERC, 5/76), the dispute was over the ratification obligations of County Board members who were members of the bargaining team and who were present when a tentative agreement was reached. Thus, Florence County is of no analytical value either.

Lastly, we would note when an Examiner decision becomes a Commission decision purely by operation of Sec. 111.07(5), the decision is of limited precedential value. City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

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