STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 144
No. 54273
MP-3187

Decision No. 28859-B

Appearances:

Weber & Cafferty, S.C., by **Attorney Robert K. Weber,** 2932 Northwestern Avenue, Racine, Wisconsin 53404, for the Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Douglas E. Witte,** Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, for the Racine Unified School District and the Board of Education of the Racine Unified School District.

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

On August 8, 1997, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondents had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 or 5, Stats., during the 1996-1997 school year by modifying the starting and ending times of the teacher work day and by conducting six two-hour staff development (inservice)

sessions. He therefore dismissed the complaint.

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 filed briefs in support of and in opposition to the petition, the last of which was received October 6, 1997. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

Examiner Findings of Fact 1 through 3 are affirmed.

Examiner Finding of Fact 4 is affirmed as modified to reflect that the Respondent District implemented a qualified economic offer for the 1993-1995 contract years.

Examiner Finding of Fact 5 is affirmed.

Examiner Finding of Fact 6 is affirmed as modified to reflect that the Respondent District adopted a Staff Development Policy in November, 1996.

Examiner Findings of Fact 7 through 14 are affirmed.

Examiner Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier, Chairperson

Henry Hempe, Commissioner

Paul A. Hahn, Commissioner

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

BACKGROUND

During a hiatus between contracts, the Respondents decided to require teachers represented by Complainant to attend two-hour staff development (inservice) sessions during six of the 180 student teacher contact days in the 1996-1997 school year. To avoid a decrease in student teacher instructional time, the Respondents lengthened the student day by four minutes for the remaining 174 student teacher contact days in the 1996-1997 school year to make up for the twelve hours of instructional time which would otherwise have been lost due to the six training sessions. On the six student teacher contact days when training occurred, students reported two hours later than usual.

The Respondents' actions did not increase the total number of teacher work days during the 1996-1997 school year or the amount of student teacher instructional time. The Respondents' actions did: (1) increase the amount of training teachers had previously been required to attend by twelve hours (and, of necessity, modified the timing of when inservice training had previously occurred during the school year); (2) reduce the amount of preparation time some teachers would otherwise have received on the days training was held; and (3) change the time of day that teachers reported to and left school.

THE EXAMINER'S DECISION

As to whether Respondents' implementation of the six inservice training sessions violated their duty to bargain with Complainant, the Examiner noted that the duty to maintain the status quo as to wages, hours and conditions of employment during a contact hiatus is limited to mandatory subjects of bargaining. He then determined that the Respondents' actions involved two decisions: (1) lengthening the student day by four minutes; and (2) altering six work days by delaying the start of the student day to provide time for the six inservice sessions. He concluded that the decision to lengthen the student day by four minutes was a permissive subject of bargaining under existing precedent and the facts of the case. However, the Examiner concluded that under his reading of BELOIT EDUCATION ASSOCIATION VS. WERC, 73 WIS.2D 43 (1976) and SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84) the expansion of inservice and the change in its timing during the school year were mandatory subjects of bargaining.

The Examiner then applied the status quo doctrine to the question of whether the inservice changes violated Respondents' duty to bargain with Complainant and concluded that the changes did not violate Sec. 111.70(3)(a)4, Stats. Analyzing language from the most recent expired contract and the manner in which such language had been historically interpreted, he determined that under the dynamic status quo, the Respondents had retained the right to conduct inservice in the manner implemented during the 1996-1997 school year. Thus, he dismissed this portion of the complaint.

The Examiner found no evidence that the inservice change had been motivated by hostility

toward the exercise of rights protected by the Municipal Employment Relations Act and therefore dismissed the alleged violation of Sec. 111.70(3)(a)3, Stats. He dismissed the alleged violation of contract claim based on his analysis of the alleged violation of Sec. 111.70(3)(a)4, Stats. Lastly, he dismissed the derivative alleged violation of Sec. 111.70(3)(a)1, Stats., inasmuch as no other prohibited practice had been found to exist.

POSITIONS OF THE PARTIES

Complainant argues that the Examiner erred when he concluded that language from the expired 1992-1993 contract gave the Respondents the discretion to modify the status quo by extending the teacher work day, increasing inservice requirements, and unilaterally establishing when the new inservice would occur. Complainant contends that the arbitration awards on which the Examiner relied are clearly flawed and that the contract language in question clearly does not give the Respondents the discretion to unilaterally increase the amount of inservice, particularly when preparation time is also reduced.

Given the foregoing, Complainant asks that the Commission reverse the Examiner and that appropriate make whole and cease and desist relief be ordered.

Respondents urge affirmance of the Examiner. Assuming that the Respondents' conduct implicated mandatory subjects of bargaining, Respondents contend the Examiner appropriately

decided that the dynamic status quo created by the expired 1992-1993 contract allowed the Respondents to act as they did. However, Respondents urge the Commission to further conclude that the decision to expand inservice and the resultant change in teacher hours are in fact permissive subjects of bargaining which need not be bargained with Complainant. In this regard, Respondents argue the Examiner should have, but did not, considered the record before him when deciding whether the decisions in question were mandatory or permissive subjects of bargaining.

DISCUSSION

We affirm the Examiner's dismissal of the complaint.

All of the conduct in question took place while no collective bargaining agreement was in effect. 1/ It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. 2/ If the municipal employer makes changes in mandatory subjects which are consistent with its rights under the dynamic status quo, 3/ it does not violate Sec. 111.70(3)(a)4, Stats. 4/ As we stated in VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96):

> The status quo doctrine does no more than continue the allocation of rights and opportunities reflected by the terms of the expired contract while the parties bargain a successor agreement. . . . The dynamic status quo allows parties to exercise rights

which they have acquired through the collective bargaining process.

Here, Complainant argues the Respondents' actions as to scheduling twelve hours of inservice training improperly modified the status quo as to mandatory subjects in the following ways: (1) changed the starting and ending time of the teacher work day; (2) increased the amount of inservice and the timing thereof during the school year; and (3) reduced the amount of preparation time which would otherwise have been available. Assuming arguendo that changes (1) and (2) involve matters which are, on balance, mandatory subjects of bargaining, no violation of Sec. 111.70(3)(a)4, Stats., occurred because the Respondents acted within their dynamic status quo rights as defined by the expired 1992-1993 contract. As to change (3), assuming arguendo that the expired 1992-1993 contract guaranteed preparation time which was lost due to increased inservice, no violation of Sec. 111.70(3)(a)4, Stats., occurred because preparation time is a permissive subject of bargaining which is thus <u>not</u> protected by the status quo doctrine.

Looking first at the modification of the starting and ending times of the teacher work day, Section 10.2 of the expired 1992-1993 agreement states:

> **Teacher Starting and Ending Times**
>
> All teachers are expected to be in their respective rooms or assigned places as least fifteen (15) minutes before the time for the tardy signal. Teachers are expected to be present and performing their teaching duties during the time that pupils are required to be there according to the hours of school as presently established by the Board.

> Teachers in secondary schools shall be available for a period of at least (15) minutes after regular pupil dismissal. In elementary schools the teachers shall be available for a period of at least (10) minutes after regular pupil dismissal. In elementary schools the principal, on an equitable basis, may assign a portion of the teaching staff responsibilities related to pupil dismissal for a fifteen (15) minute period immediately after regular pupil dismissal. Teachers not so assigned shall be free to leave the building for the day following the elapse of ten (10) minutes after regular pupil dismissal.

Under Section 10.2, the start and end of the teacher workday is set by the student day. The expired 1992-1993 contract does not restrict Respondents' right to establish or modify the length or starting and ending times of the student day 5/ and, even if it did, such restrictions would be permissive subjects of bargaining 6/ whose binding nature ends with the expiration of the contract. Thus, the expired contract allows modification of the student day and, by reference, allows modification of the start and end of teacher work day. 7/ Thus, assuming arguendo that a four minute change in a teacher work day is a mandatory subject of bargaining, 8/ Respondents have the right to modify the work day under the status quo. Thus, the change in question did not violate Sec. 111.70(3)(a)4, Stats.

Looking next at the increase in the amount of inservice and the accompanying change in the timing thereof, Section 10.5 of the expired 1992-1993 agreement states:

> **Building/Departmental/Subject Area Meetings**
>
> Teachers, unless excused by the person calling the meeting, may be required without additional pay to attend the following meetings outside the regular teacher day: building staff meetings, departmental meetings and subject area meetings called by directors. Any teacher required to attend more than thirty (30) hours per school year in these required meetings will be paid seventeen cents (17cents) a minute for any time spent beyond the

thirty (30) hours.

As interpreted 9/ and applied, 10/ Section 10.5 includes inservice within the types of meetings which teachers can be required to attend outside the regular teacher day. Section 10.5 does not limit Respondents' discretion as to the timing of these meetings during the school year. Thus, again assuming arguendo that the amount and timing of inservice are mandatory subjects of bargaining, 11/ Respondents have the status quo right to use Section 10.5 to increase inservice time and to schedule such inservice throughout the school year as they see fit. Thus, this change did not violate Sec. 111.70(3)(a)4, Stats.

Lastly, there is the issue of preparation time lost on the six days when the regular student day is modified to accommodate the two hour inservice sessions. As reflected in Examiner Findings of Fact 11 and 13, there is room for reasonable doubt as to whether the lost preparation time violates the preparation time language found in Sections 10.1.2, 10.4.1 and 10.4.2 of the expired 1992-1993 contract. However, even assuming that it does violate these provisions, based on the record before us, we find the preparation time language to be a permissive subject of bargaining 12/ and thus not part of the status quo Respondents' are obligated to maintain by the duty to bargain.

Given all of the foregoing, we affirm the Examiner's dismissal of the Sec. 111.70(3)(a)4, Stats., allegations in the complaint. While not specifically pursued by Complainant's on review, we

also affirm the Examiner's dismissal of the Sec. 111.70(3)(a)3, Stats., allegation that the Respondents took the inservice actions at least in part because of hostility toward the Complainant's exercise of rights under the Municipal Employment Relations Act. Having found no independent prohibited practices to have been committed, dismissal of the derivative Sec. 111.70(3)(a)2, Stats., allegation is also appropriate.

Dated at the City of Madison, Wisconsin this 5th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier, Chairperson

Henry Hempe, Commissioner

Paul A. Hahn, Commissioner

ENDNOTES

1/ For this reason, dismissal of Complainant's Sec. 111.70(3)(a)5, Stats., violation of contract claim is appropriate.

2/ ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFF'D MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84).

3/ The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, IBID; VILLAGE OF SAUKVILLE, IBID.

4/ ST. CROIX, OP. CIT; MAYVILLE, OP CIT; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 26817-C (WERC, 3/93).SUPRA.

5/ See the Petrie and Miller arbitration awards cited in Examiner Finding of Fact 11.

6/ SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84).

7/ Again see the Petrie and Miller arbitration awards cited in Examiner Finding of Fact 11.

8/ Complainant correctly argues that bargaining over hours is a basic employe interest. However, as we noted in SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 21466 (WERC, 3/84) AT 81:

> Indeed, bargaining over "hours" is a basic employe interest because the amount of time which an employe must work has an obvious and direct relationship upon the time which that employe has available for non-work related activities upon which the employe may well place far greater value in his or her life. In addition, there is the intimate relationship between the number of hours an employe works and the amount of compensation which the employe and the bargaining representative will seek as compensation. However, a close examination of those decisions reveals that in each instance the Commission was satisfied, when balancing the relationship of the proposal to hours and conditions of employment and to public policy concerns, that the proposal in question did not prevent the employer form providing the basic service for which it utilized the employes. Here we are confronted with District assertions that the proposal will prevent the District form providing basis service by (1) restricting the hours when any bargaining unit employes can be required to work;

and (2) structuring compensation in a way which will break down existing professionalism. We will address these concerns separately.

We commence our consideration of proposal 8 by concluding that the proposal can reasonably be interpreted as allowing the District the discretion to assign teachers duties outside the hours specified therein. Indeed, the Association asserts and we concur with a conclusion that the District retains the discretion to require any or all teachers to perform work assignments on a daily basis outside the hours specified in the proposal. Thus, while the specified times currently parallel the existing student school day and the record further reflects that the District has no current plans to alter that day, the District could, without violating this proposal, establish a school day outside the parameters of the hours set forth in the proposal subject only to the payment of the overtime rate contained therein. Thus, we reject the District's contention that this proposal could prevent the District from requiring that teachers be present during a school day the times of which were different than those specified in the proposal. Therefore, contrary to the District's claim, we find that this proposal has no effect in the District's prerogative to schedule school at times and for lengths of time which it deems educationally appropriate and does not prevent the District from providing the basic service for which it utilizes the teachers.

Further, as noted in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27972-C (WERC, 3/96) AFF'D RACINE EDUCATION ASS'N V. WERC, 214 WIS.2D 352 (1997):

At the outset of our consideration of the issues in this case, it is important to make several general observations. To some extent, the Complainant Association concedes that it may be appropriate for Respondent District to unilaterally determine as a matter of educational policy that it wishes to have some students attend school on a year-round basis. Complainant then argues that it only wishes to bargain about how year-round school will be implemented, vis-à-vis employe work schedules, etc. Another way of framing this analytical perspective would be to say that the Respondent District can unilaterally decide which days students will be present but Respondent District must bargain over which days teachers will be present to teach those students. Because of the obvious and essential need to have students and teachers present at the same time if any education is to occur, this approach to the issues before us is not a valid one.

Instead, any analysis of school calendar issues must acknowledge the reality that determinations of when students will be in school also determine when teachers will work. . . .

However, as reflected in JANESVILLE, it is clear that a union has the right to bargain for additional compensation when employes work outside certain hours.

9/ See the Mueller and Fleischli arbitration awards cited in Examiner Findings of Fact 11.

10/ See the testimony at Tr. 89, 151, 159-162, 108-169 regarding use of Section 10.5 for inservice.

11/ Complainant correctly points out that number and timing of inservice days have been found to be mandatory subjects of bargaining. However, as we emphasized in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27972-C (WERC, 3/96):

> Complainant correctly argues that in School District of Janesville, Dec. No. 214656 (WERC, 3/84), the Commission reviewed its prior holding in School District of Beloit, Dec. No. 11831-C (WERC, 9/74) and the Wisconsin Supreme Court's affirmance thereof in Beloit Education Association v. WERC, 73 Wis.2d 43 (1976) and concluded that there was a duty to bargain over: (1) the length of the school year; (2) the number of teaching days; (3) in-service days; (4) convention days; and (5) vacation periods. However, Commission duty to bargain decisions are always based upon the record presented by the parties. Thus in Janesville, the Commission majority commented: "We see no basis in this record for overturning those prior determinations."
>
> Here, we are presented with the record these parties have created. We proceed to decide this case based on this record.
>
> . . .
>
> As previously noted, the record does not definitively tell us the extent to which the year-round calendar implemented by the Respondent altered the schedule of in-service days, convention days, holidays, pay days, snow makeup days, etc. Suffice it to say that these aspects of "school calendar" have historically been found to be mandatory subjects of bargaining and that any change by Respondent in these areas would be subject to the same "primarily related" analysis we have applied to the redistribution of work/vacation time. If the "educational policy" dimensions of when paychecks are distributed, when snow days are made up, when in-service is conducted, whether employes can attend union conventions, or whether employes would have to work "holidays" predominated over the impact on employe wages, hours and conditions of employment, then the Respondent would not be obligated to bargain over such matter(s). If the wage, hour and condition of employment relationship predominated, then these matters would be mandatory subjects of bargaining.

The Court of Appeals echoed our view on appeal when it stated at 214 WIS.2D 352, 361 THAT:

> REA also contends that this decision "contravenes a long line of rulings interpreting calendar issues." REA posits that "under the approach now taken by the Commission . . . [r]adical changes in teacher hours and vacation schedules would be permitted in the absence of a negotiated agreement, while relatively minor calendar changes (e.g., the day of the school year calendar on which an annual inservice program takes place) would be precluded." We are not persuaded that WERC's decision will have such an impact.
>
> The "primarily related" test does not lend itself to "broad and sweeping rules that are to apply across the board to all situations." *Beloit Educ.,* 73 Wis.2d at 55, 242 N.W.2d at 236. Instead, it is intended to be applied as a "case-by-case approach to specific situations." *Id.* In this case, WERC weighed the evidence and testimony presented by both sides and concluded that the implementation f a year-round program was primarily related to educational policy. A different set of facts could result in a different decision. In this case, we conclude that there is a rational basis for the conclusion of WERC, and consequently affirm.
>
> *By the Court.* - Order affirmed.

12/ In prior decisions, preparation time has been found to be a permissive subject of bargaining because the educational policy implications in terms of the allocation of the teacher work day outweighed the impact on teacher hours and conditions of employment. OAK CREEK SCHOOL DISTRICT, DEC. NO. 11827-D (WERC, 4/74) AFF'D (CIR CT DANE, 11/75); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-A (WERC, 283). This record does not persuade us that a different result should be reached here.