STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WHITEWATER UNIFIED SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Sec. 111.70(4)(b), Stats., Involving a Dispute Between Said Petitioner and WHITEWATER EDUCATION ASSOCIATION	Case 34 No. 54827 DR-364 Decision No. 29106

Appearances:

Quarles & Brady, Attorneys at Law, by Mr. Gary M. Ruesch and Mr. Michael Aldana, 411 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202, for the District.

Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, 53708-8003, for the Association.

ORDER DISMISSING PETITION FOR DECLARATORY RULING

On January 17, 1997, the Whitewater Unified School District filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling as to whether the District has a duty to bargain with the Whitewater Education Association over certain proposals contained in the Association's final offer.

On January 29, 1997, the Association advised the Commission by letter that it was amending its offer to delete the language as to which the District had filed its declaratory ruling petition. The Association further asked the Commission to dismiss the declaratory ruling petition.

By letter dated, February 19, 1997, the District advised the Commission and the Association as follows:

> Please be advised that the Whitewater Unified School District is amenable to withdrawing the petition for declaratory ruling in the above-referenced matter. In order to do this, however, the Whitewater Education Association (WEA) must stipulate that the language in dispute is, in fact, permissive and was properly evaporated by the Board. In the event that they are unwilling to do that, the District believes that this matter is still in controversy inasmuch as the WEA has alleged that

the Board's evaporation is improper since it included mandatory language. This allegation could form the basis for further litigation. In addition, the WEA could modify their current final offer and resubmit the language in dispute.

By letter dated March 7, 1997, the Association responded as follows:

The Association is unwilling to stipulate that the language in dispute is permissive and was properly evaporated by the Board. To the contrary, we believe that the work load language, which did not prevent the Board from assigning any work load, but merely required a monetary payment for work assigned over a certain level, was clearly mandatory.

That being said, it is not the intent of the Association to file a prohibited practice complaint over the District's evaporation of the language, assuming that the District returns to the bargaining table and, if needed, to interest arbitration.

The Association requests that the Declaratory Ruling be dismissed, absent withdrawal by the School Board.

By letter dated March 24, 1997, the District responded as follows:

Please be advised that the District has considered the position of the Association contained in Attorney Cherney's letter of March 7, 1997. Given this position, the District is not willing to withdraw the declaratory ruling petition nor stipulate to its dismissal. We would request that the Commission schedule a hearing on the petition and/or establish a briefing schedule to consider the motion of the Association.

The parties thereafter filed written argument with respect to whether the petition should be dismissed, the last of which was received May 2, 1997.

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

ORDER 1/

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

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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 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

(Footnote 1 continues on page 4)

(Footnote 1 continued from page 3)

The petition for declaratory ruling is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of June 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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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.

MEMORANDUM ACCOMPANYING ORDER DISMISSING
PETITION FOR DECLARATORY RULING

The introductory paragraphs which precede our Order present the current context in which we are asked to decide whether there continues to be a duty to bargain "dispute" within the meaning of Sec. 111.70(4)(b), Stats.

The Association contends no "dispute" exists because it has withdrawn the proposal which contained the disputed language. The Association cites Menomonee Falls School District, Dec. No. 21199 (WERC, 11/83) and Wheatland Center Schools, Dec. No. 21972 (WERC, 9/84) as being supportive of its position.

The District asserts that even under the rationale in Menomonee Falls and Wheatland, there continues to be a "dispute" because the Association could again amend its proposal to reinsert the challenged language and continues to threaten a prohibited practice complaint if the District implements any changes as a result of the "evaporation" of the disputed language.

In Menomonee Falls, we held in pertinent part as follows:

. . .

> When a party withdraws portions of an existing proposal or indicates that it does not propose to include portions of an expired contract in a successor agreement, we do not believe that there is presently a "dispute" within the meaning of Sec. 111.70(4)(b), Stats. as to the "duty to bargain" as to a successor agreement. We cannot concur with the District's argument that a dispute exists until the Association agrees that language it is no longer proposing is permissive. A contrary conclusion would, as our prior above-quoted holding indicates, subject the mediation-arbitration process to delays which we believe are contrary to the intent of the Legislature when it passed Sec. 111.70(4)(cm)6.g., Stats., (which incorporates Sec. 111.70(4)(b), Stats., by its terms). Such questions can, of course, be submitted to the Commission in the form of a Sec. 227.06, Stats., petition for declaratory ruling. Under that provision, whether the Commission hears and decides the matter is discretionary. Should the Association propose during the course of the parties' future negotiations over a successor to the 1981-1983 contract that any of the challenged language be placed in such a contract, the District would, of course, have the right to file a new petition for declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. seeking a Commission determination as to the duty to bargain over such a proposal.

. . .

We agree with the District that Sec. 111.70(4)(b) Stats., is intended in part to resolve disputes concerning the duty to bargain so that the dispute need not escalate into conduct that becomes the subject of prohibited practice proceedings. However, in our view, the "dispute . . . concerning the duty to bargain on any subject" to which Sec. 111.70(4)(b), Stats., applies must concern the existence or non-existence of a present duty to bargain on any subject. Here, the Association's unwillingness to concede that certain language in the expired agreement is non-mandatory in nature (and its accompanying threat of prohibited practice proceedings in the event the District unilaterally changes any mandatory subjects without bargaining) do not amount to a dispute about the existence of a present District duty to bargain about the subjects referred to in the petition. The Association's positions, instead, present the possibility of a dispute at some future time as to the existence or non-existence of a District duty to bargain about those subjects at that time. Indeed, if we were to reach the merits of the petition in the present circumstances, we would undoubtedly conclude that the District has no present duty to bargain about the subjects referred to in the petition because the Association is not proposing inclusion of the language involved in the successor agreement and because the District has no present duty to bargain about those subjects.

If, in the future, the District were to support a petition for a Sec. 111.70(b)(b), Stats. declaratory ruling with a showing, for example, that it had given notice to the Association of an intention to take certain action and was, in response to that notification, presented with an Association demand to bargain about the subject, then the case would be in a materially different posture. On the present record, however, there is no dispute between the parties concerning the present duty to bargain on the subjects referred to in the petition. The Sec. 111.70(4)(b), Stats., procedure is not, in our view, available to resolve, at present, possible disputes about the existence or non-existence of a District duty to bargain about a subject that may arise at some time in the future in materially different circumstances than presently exist.

We would also note that where, as here, the Association chooses to respond to a petition for declaratory ruling by taking the challenged language off the bargaining table, thereby removing a "dispute," it has met its obligation under ERB 18.03 as it has removed the necessity for further proceedings.

Applying Menomonee Falls to this case, we conclude that there presently is no "dispute" within the meaning of Sec. 111.70(4)(b), Stats., 2/ The Association has dropped the disputed

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2/ In its brief, the District suggests that we could treat the petition as having been filed

(Footnote 2 continues on page 7)

language from its proposal and expressed a present intent not to file a duty to bargain prohibited practice complaint. As indicated in the above quoted portions of Menomonee Falls, if the Association were to again propose to include the disputed language in a successor contract or to threaten to file a prohibited practice complaint, the District is free to return to us.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of June 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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under Sec. 227.41, Stats., and issue a declaratory ruling decision as a discretionary exercise of jurisdiction. In Winnebago County, Dec. No. 27669 (WERC, 5/93), we stated that when determining whether to exercise Sec. 227.41, Stats., discretion, we consider the following factors:

1. The Commission's finite resources.

2. The guidance, if any, which a decision might provide to parties statewide.

3. The degree to which exercise of jurisdiction will denigrate other procedures available to the parties for resolution of their dispute.

Here, because we do not have a Sec. 227.41 Stats. petition before us, we need not decide whether we would assert jurisdiction.