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## WISCONSIN COURT OF APPEALS

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**DISTRICT II**

October 24, 2001

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[Decision No. 29659-F]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

You are hereby notified that the Court has entered the following opinion and order:

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01-0247	Racine Education Association v. Wisconsin Employment Relations Commission and Racine Unified School District (L.C. #00-CV-1060)
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Before Nettesheim, P.J., Anderson and Snyder, JJ.

The Racine Education Association (REA) appeals from the order of the circuit court which affirmed the decision of the Wisconsin Employment Relations Commission (WERC) to dismiss REA's action against the Racine Unified School District. We conclude at conference that this appeal is appropriate for summary disposition. WIS. STAT. Rule 809.21 (1999-2000).<sup>1</sup>  
We affirm.

REA filed a prohibited practice complaint with WERC alleging that the District had unilaterally implemented an in-service proposal before reaching impasse in violation of Wis.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

STAT. § 111.70(3)(a). A hearing examiner concluded that the District did not violate the statute and dismissed REA's complaint. REA appealed to the Commission and the Commission affirmed the hearing examiner's decision. The Commission concluded that REA's conduct constituted a violation of its duty to continue to meet with the District to reach an agreement and that such conduct prevented the parties from reaching an impasse. REA then sought review of the Commission's decision in the circuit court and the circuit court affirmed. REA appeals.

On appeal from an order affirming the decision of the Commission, we review the Commission's decision and not the circuit court's. *Zimbrick v. LIRC*, 2000 WI App 106, ¶9, 235 Wis. 2d 132, 613 N.W.2d 198. Whether REA was denied procedural due process is a question of constitutional fact which we review de novo. *See id.*

REA argues that the Commission violated its due process rights because the Commission did not give REA notice that its conduct while bargaining with the District would be an issue in the Commission's decision. Due process requires that a party be given notice and an opportunity to be heard. *Id.* at ¶10. WERC responds, however, that in its brief to the Commission, REA cited to *Green County Deputy Sheriff's Ass'n v. Green County*, Decision No. 20308-A (WERC August 1983), *aff'd as modified by* Decision No. 20308-B (WERC November 1983). In the *Green County* case, the hearing examiner stated:

Whether an impasse exists must be determined in the context of the facts in a particular case, as they exist at a particular point in time.

"Whether a bargaining impasse exists is a matter of judgment. The bargaining history, *the good faith of the parties in negotiations*, ... the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be

considered in deciding whether an impasse in bargaining existed."

*Green County*, Decision No. 20308-A at p. 8 (emphasis added; citations omitted).<sup>2</sup> The quoted language establishes that the bargaining postures of the parties is a factor to be considered in determining whether an impasse has been reached. Since *Green County* established that the bargaining postures may be considered, we conclude that the issue should not have been a surprise to REA, and, consequently, that its due process rights were not violated.

REA also argues that WERC's finding that REA engaged in "unlawful, abusive delay" constitutes an improper application of a newly announced rule of law. In order for a rule of law not to be applied retroactively, the rule must satisfy three requirements. *State v. Thiel*, 2001 WI App 52, ¶10, 241 Wis. 2d 439, 625 N.W.2d 321, *review denied*, 2001 WI 88, \_\_\_ Wis. 2d \_\_\_, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 99-0316). These requirements are whether: (1) the decision creates a new principle of law, either by overruling clear past precedent on which the parties have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) retrospective application will promote or retard the operation of the rule recognized or established by the decision; and (3) retrospective application could produce substantial inequitable results. *Id.*

We conclude that the rule is not a new one, but was identified, or at the very least clearly foreshadowed, in the *Green County* case. Further, the application of the rule does not retard the purpose of the rule, nor create inequitable results. Therefore, retroactive application of the rule

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<sup>2</sup> In fact, the record indicates that REA quoted this language in its brief.

was warranted. Since we have decided the appeal on these grounds, we need not address the other issues raised by the parties.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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Cornelia G. Clark  
Clerk of Court of Appeals