STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

MONONA GROVE SCHOOL DISTRICT

Requesting a Declaratory Ruling Pursuant to Section 227.41,
Wis. Stats., Involving a Dispute Between Said Petitioner and

MONONA GROVE EDUCATION ASSOCIATION

Case 86
No. 59056
DR(M)-614

Decision No. 29981

Appearances:

Lathrop & Clark, by **Attorney Kirk D. Strang,** 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of Monona Grove School District.

Haus, Resnick and Roman, LLP, by **Attorney William Haus,** 148 East Wilson Street, Madison, Wisconsin 53703-3423, appearing on behalf of Monona Grove Education Association.

ORDER

On July 11, 2000, the Monona Grove School District filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 227.41, Stats., seeking a declaratory ruling as to whether a proposal to commence the "school term" before September 1 in any school year is a mandatory subject of bargaining in light of Sec. 118.045, Stats.

On July 18, 2000, the Monona Grove Education Association filed a position statement urging the Commission to decline to assert jurisdiction over the petition.

On August 21, 2000, the District filed a response.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Wisconsin Employment Relations Commission hereby exercises its jurisdiction over the petition.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

Monona Grove School District

MEMORANDUM ACCOMPANYING ORDER

BACKGROUND

The District's petition seeks a declaratory ruling pursuant to Sec. 227.41, Stats., as to whether it must bargain with the Monona Grove Education Association during upcoming negotiations for a 2001-2003 contract over any Association proposal that school begin before September 1.

The Association asks that we not exercise jurisdiction over the petition because there is no present dispute between the parties over the issue presented in the petition. The Association contends that absent a present dispute between the parties, a declaratory ruling is not available under Sec. 227. 41, Stats. The Association further argues that issuance of an advisory opinion would not promote labor peace because it would be an "end run" around the collective bargaining process. The Association points to the availability of a declaratory ruling under Sec. 111.70(4)(b), Stats., to resolve any actual dispute the parties ultimately may have. The Association argues that given the availability of Sec. 111.70(4)(b), Stats., we would be violating our own statutory procedures if we were to exercise jurisdiction over the District's petition.

On the merits of the petition, the Association argues that a proposal to begin the school year before September 1 remains a mandatory subject of bargaining despite the content of Sec. 118.045, Stats.

The District acknowledges that there is no present controversy between the parties but argues that Sec. 227.41, Stats., does not require the existence of such a controversy as a condition precedent to the exercise of jurisdiction. The District argues that issuance of a declaratory ruling will enhance labor peace across Wisconsin because all affected parties will know their rights before they begin bargaining on the issue of when to start school. The District contends that if it must await the existence of a dispute during the bargaining process and then seek a resolution pursuant to Sec. 111.70(4)(b), Stats., the parties and the public will be confronted with avoidable uncertainty as to when school will start and will be virtually certain to experience delay in the establishment of a 2001-2002 school calendar. The District also asserts that the interaction between the duty to bargain and the requirements of Sec. 118.045, Stats., is a matter of public concern and controversy across Wisconsin.

On the merits, the District asserts that under Sec. 118.045, Stats., a proposal to begin school before September 1 is not a mandatory subject of bargaining.

DISCUSSION

Section 227.41(1), Stats, provides in pertinent part:

> (1) Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. . . .

As reflected by the statutory use of the word "may," it is clear that issuance of a declaratory ruling under Sec. 227.41, Stats., is discretionary. We have exercised that discretion by declining to issue declaratory rulings which (1) would not provide guidance to parties around Wisconsin on matters of general applicability and/or (2) would denigrate other procedures available to the parties for resolution of the dispute. SEE GREEN LAKE COUNTY, DEC. NO. 22820 (WERC, 8/85); CITY OF MILWAUKEE, DEC. NO. 27111 (WERC, 12/91); UW HOSPITAL AND CLINICS AUTHORITY, DEC. NO. 29889 (WERC, 5/2000). We have never dismissed a petition based on lack of jurisdiction. Here, the Association argues we should do just that because "Advisory opinions that do not arise out of live facts in a case or controversy are not available under Section 227.41."

In support of its jurisdictional argument, the Association cites that portion of BOARD OF SCH. DIRECTORS OF MILWAUKEE V. WERC, 42 WIS.2D 637, 656 (1969) which states:

> The only difference between the position of the WERC and the position of the circuit court is that the WERC answered the hypothetical question -- "Can a municipal employer grant to the majority union exclusive access to nonpublic bargaining data?" The WERC answered the question "Yes," but the circuit court did not answer it at all.
>
> Although it would appear that the WERC has applied the proper test (referred to earlier in the opinion) to this portion of the dispute, we do not believe the court should answer this hypothetical question. It is one thing to review a declaratory ruling; it is quite another thing to render an advisory opinion. The court has always declined to decide speculative issues. The declaratory ruling which was requested involved real facts and was capable of resolution. Once it is determined, however, that the list in question was a public record, no further review of the question is necessary.
>
> We agree with the WERC's finding and the circuit court's finding that the list of teachers was a public record.

We think it apparent from the Court's opinion that it was commenting on the Court's own jurisdiction to decide "speculative issues" and not on the scope of the WERC's jurisdiction when asked to issue a declaratory ruling under what is now Sec. 227.41, Stats. Thus, we conclude that MILWAUKEE does not shed much light one way or the other on the jurisdictional issue raised by the Association.

The Association also cites LISTER V. BOARD OF REGENTS, 72 WIS.2D 282 (1976) in support of its jurisdictional argument. However, as noted by the District, LISTER holds that a **court** should entertain a request for declaratory relief only when there is a "justiciable controversy." Thus, while LISTER may provide us with some guidance, it is certainly not dispositive of the jurisdiction of an administrative agency under Sec. 227.41. Stats.

While we have not found any judicial precedent regarding the limits of an administrative agency's jurisdiction to issue a declaratory ruling under Sec. 227.41 (or its predecessor Sec. 227.06, Stats.), we do have some internal WERC precedent which is useful to consider.

In ASHWAUBENON SCHOOL DISTRICT NO. 1, DEC. NO. 14774-A (WERC, 10/77), the Commission was asked by the school district to issue a declaratory ruling regarding its right to communicate with its employes while bargaining is in progress. The union argued the Commission lacked jurisdiction because there was no "case in controversy." The Commission held:

> Section 227.06(1), Stats., as distinguished from section 111.70(4)(b), does not explicitly condition the issuance of a declaratory ruling upon the existence of a dispute. Indeed, the purpose in seeking declaratory rulings is to obtain a declaration of one's rights to enable a decision on future action rather than precipitate protracted litigation.

The Commission went on to conclude that it should exercise its discretionary jurisdiction because past litigation demonstrated a need for further clarification of municipal employer communication rights and because "this is not a hypothetical situation but, rather, involves actual facts and is capable of being resolved."

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 17504-17508, (WERC, 12/79), the Commission was confronted with a union request that it issue a duty to bargain declaratory ruling on union proposals as to which the employer had agreed to bargain. The Commission held that the union had no right to a declaratory ruling under Sec. 111.70(4)(b), Stats., because there was no "dispute" but that the Commission would have jurisdiction to

issue a declaratory ruling under Sec. 227.06, Stats. The Commission declined to exercise that jurisdiction because the case-by-case analysis generally applied to duty to bargain disputes meant that a ruling would not provide guidance to others or "certainty in the law" and because of concerns that the issues would not be well litigated in the parties' non-adversarial context.

As reflected by ASHWAUBENON and MILWAUKEE, the Commission has taken a broad view of its jurisdiction to issue declaratory rulings under Chapter 227. In ASHWAUBENON, the Commission rejected a "case in controversy" jurisdictional requirement because it concluded that the purpose of Chapter 227 declaratory rulings was assisting parties in avoiding litigation. In MILWAUKEE, the Commission concluded that even in the absence of a present dispute between the parties, it had jurisdiction to issue a Chapter 227 declaratory ruling. Applying this Commission precedent to the case at hand, we conclude that we have jurisdiction to issue a declaratory ruling under Sec. 227.41, Stats. In the words of Sec. 227.41, Stats., the District has asked about the "applicability" of "statute enforced by" the Commission (i.e. Secs. 111.70(1)(a) and (3)(a) 4, Stats.). The Association's argument about the absence of a present controversy is relevant to the question of whether we should exercise our jurisdiction -- but not a persuasive basis for concluding that we have no jurisdiction. We now turn to the question of whether we should exercise jurisdiction over the petition.

As discussed earlier herein, the question of whether a declaratory ruling will provide statewide guidance looms large when we decide whether to exercise jurisdiction. As reflected by the Commission's decision not to exercise jurisdiction over the petition in MILWAUKEE, if the issue presented by the District was of a type in which a case-by-case fact specific analysis would be applicable, limited statewide guidance would be provided by resolving the issue. Here, the issue presented is almost purely a legal one -- the impact of Sec. 118.045, Stats., on the duty to bargain over when school begins. Thus resolution of this issue is not dependent on facts and the outcome will not differ on a case-by-case basis. Therefore, we think it is clear that exercise of jurisdiction will provide guidance to school districts and unions throughout Wisconsin as to a matter of general applicability -- the impact of Sec. 118.045, Stats., on the duty to bargain over whether school should begin before September 1. The guidance so provided argues strongly in favor of exercise of jurisdiction over the petition.

As to the matter of whether exercise of jurisdiction would denigrate other procedures available for the resolution of this issue, the Association correctly notes that Sec. 111.70(4)(b), Stats., will be available to the District as a matter of right if the parties in fact have an actual dispute over the impact of Sec. 118.045, Stats., during their upcoming collective bargaining. However, on balance, we are satisfied that any denigration of Sec. 111.70(4)(b), Stats., is overcome by the statewide value of the guidance provided by the exercise of jurisdiction.

Contrary to the Association, we are persuaded that such guidance regarding the duty to bargain is consistent with and indeed promotes "The public policy of the state as to labor

disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining." Sec. 111.70(6), Stats. As argued by the District, the collective bargaining process is enhanced if the parties know their rights as they begin the process.

In closing, we note that although the parties are not presently embroiled in a collective bargaining dispute over when school should begin, they do in fact disagree as to how the merits of the legal issue presented by the petition should be resolved. Thus, although Sec. 227.41, Stats., does not require that there be an existing controversy before jurisdiction can be exercised, these parties do in fact have a dispute over their respective duty to bargain obligations as to the issue presented. Therefore, we are also satisfied that the concern expressed in MILWAUKEE about deciding issues without the benefit of an adversarial context is not present here.

Given all of the foregoing, we exercise jurisdiction over the District's petition.

Dated at Madison, Wisconsin this 21st day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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