

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

SUPERIOR SCHOOL DISTRICT

Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats.,
Involving a Dispute Between Said Petitioner and

**SUPERIOR SCHOOL DISTRICT EMPLOYEES
LOCAL #1397, AFSCME, AFL-CIO**

Case 126
No. 60738
DR(M)-126

Decision No. 30347

Appearances:

Lathrop & Clark, by **Attorney Michael J. Julka**, 740 Regent Street, Suite 400, P.O Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of Superior School District.

Mr. Gregory N. Spring, Research Analyst, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Superior School District Employees Local #1397, AFSCME, AFL-CIO.

ORDER GRANTING MOTION TO DISMISS

On January 10, 2002, the School District of Superior filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a determination that certain portions of a final offer submitted by Superior School District Employees Local #1397, AFSCME, AFL-CIO are permissive subjects of bargaining.

On January 24, 2002, AFSCME filed a motion to dismiss the petition as untimely under ERC 32.12(3) as interpreted by the Commission in DOOR COUNTY, DEC. NO. 27158, (WERC, 2/92).

Dec. No. 30347

The parties thereafter stipulated to the documentary record to be considered by the Commission when deciding the motion to dismiss and filed written argument – the last of which was received April 16, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

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

ORDER

The motion to dismiss is granted.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of May, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Superior School District

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The dispute before us is whether the 10 day period established by ERC 32.12(3) for timely filing a petition for declaratory ruling was triggered by a District communication filed November 30, 2001. If the 10 day period was so triggered, then the District's January 10, 2002 declaratory ruling is untimely.

FACTS

By letter dated August 20, 2001, Commission Investigator Emery advised the parties as follows:

This is to confirm that an informal investigation will be conducted by the undersigned with respect to the petition for arbitration filed in the above-entitled matter on:

DATE: Wednesday, October 24, 2001 TIME: 5:00 p.m.

PLACE: School District offices, 3025 Tower Drive, Superior,
 Wisconsin

NOTE: Wis. Stats. 111.70(4)(cm)6 requires that a preliminary final offer be filed both by the petitioner at time of filing and by the other party within 14 days of that filing. If your responsive preliminary final offer has not yet been filed you must file it immediately and serve the petitioner with a copy.

During the investigation, if appropriate, the undersigned will engage in an effort to mediate the dispute. Should such mediation efforts not produce a settlement, the undersigned will conduct an informal investigation to adduce facts pertinent to the determination as to whether the parties are deadlocked in their negotiations, and if so, to obtain the final offers of the parties containing their final proposals on any wages, hours and working conditions in dispute, and to further obtain a stipulation executed by the parties on all matters agreed upon to be included in a new or successor collective bargaining agreement and each party's written position regarding authorization of inclusion of nonresidents of Wisconsin on the panel of arbitrators to be submitted by the Commission.

If a settlement is reached between the parties during the investigation, both parties will be expected at the conclusion of the investigation to notify the undersigned of the anticipated date of any needed ratification process. The undersigned will then proceed to close the file administratively fourteen days after the last such notified date, unless either party requests in writing that the matter be kept open.

Prior to the close of the informal investigation, the parties will be requested to exchange copies of their final offers. The investigation will not be closed until such time as the undersigned is satisfied that neither party having knowledge of the contents of the final offer of the other party desires to amend any proposal contained in its final offer.

If at the time of the exchange of final offers, no objection is raised that either final offer contains a proposal or proposals relating to non-mandatory subjects of bargaining, the undersigned shall serve a notice in writing upon the parties indicating that the investigation is closed and thereafter shall advise the Commission thereof. If during the course of the investigation, either party raises an objection that the other party's final offer relates to a non-mandatory subject of bargaining, the investigation will not be closed and the objecting party will be directed to reduce the objection to writing therein identifying the proposals involved. Such objections shall be signed and dated and a copy thereof served on the other party as well as on the undersigned, within the time period set forth by the undersigned.

With respect to alleged non-mandatory subjects of bargaining contained in any final offer, either party may file a petition with the Commission requesting a declaratory ruling to determine whether the proposals involved relate to a non-mandatory subject of bargaining.

By letter dated November 13, 2001, the District responded as follows:

As per our (sic) your directive on October 24, 2001, the Board of Education for the School District of Superior is providing a final offer in written form, with a copy to the Union representative.

Since I have been unable to talk with you regarding issues that we need clarified, I will address our issues in this letter.

1. Clarification of the process you intend to use between the parties and the exchange of bargaining offers, including determining a deadlock and certifying final offers?

2. What will be the time frame for the parties to amend a submitted offer?
3. The Board of Education reserves the right to object to permissive subjects of bargaining in the new contract.

Enclosed is the final offer as provided to AFSCME Local 1397 during the mediation session.

On November 30, 2001, Commission Investigator Emery received the following communication from the District:

The Board of Education has reviewed the final offers of the Union in letters dated November 12 and November 21. The final offer for the year 2001-2002 remains unchanged and for the year 2002-2003, the Boards (sic) final offer on wages is 1.5%. Our amended offer includes objections by the Board of Education with the final offer provided by AFSCME, Local 1397.

School District of Superior
Board of Educaiton
Final Offer Amended

AFSCME Local 1397
November 29, 2001

2001-2002

1.0% increase on hourly wage rates

Modify Article 6-Section 2-F-2

Bus drivers will be guaranteed one hundred ~~eighty (180)~~ seventy seven (177) days of pay each year.

2002-2003

1.5% increase on hourly wage rates

Objections to the Final Offer submitted by AFSCME, Local 1397 (attached)

School District of Superior
Board of Education

Permissive Language objections
to the
Final Offer submitted
by
AFSCME, Local 1397
November 29, 2001

1. Article 1
2. Article 6 – Section 2-A-1-2
3. Article 6 – Section 2-B-1-2
4. Article 6 – Section 2-B-3 (last sentence)
5. Article 6 – Section 2-B-4 (last sentence)
6. Article 6 – Section 2-C-1 thru 6
7. Article 6 – Section 2-D-1-2
8. Article 7 – Section-5-B-4
9. Article 7 – Section 8 (first sentence)
10. Article 8 – Section 3 (last sentence)
11. Article 8 – Section 4 (first sentence)
12. Article 9 – Section 1
13. Article 22 – Section 4

By letter dated December 13, 2001, Investigator Emery advised the parties as follows:

In our conversation of December 12 regarding the above you indicated that you are now representing the School District in this matter. Please be advised, therefore, that AFSCME Local 1397 has been provided a copy of the list of contract sections containing allegedly permissive language attached to the District's amended final offer dated November 29, 2001 (see attached), which the District seeks to have eliminated, and that they have advised me that they do not intend to amend their offer by letter dated December 10, 2001.

Pursuant to Section ERC 32.11(1)(b), Wis. Adm. Code, please be advised that I am directing the District to serve upon me its written objections to all allegedly permissive subjects, and its basis therefore, at my office at 718 West Clairemont Avenue, Eau Claire, Wisconsin 54701, on or before 4:30 p.m. on January 2, 2002, with a copy also to be served upon the Union. The District may, if it prefers, file a petition for a declaratory ruling on these matters with the Commission at its offices at 18 South Thornton Avenue,

Madison, Wisconsin 53703. If the District fails to complete one of those filings by 4:30 p.m. on January 2, 2002, the District will be deemed to have waived its right to object during this round of bargaining to any portion of the Union's final offer dated November 12, 2001. If the District chooses to file objections, it will have 10 calendar days after the filing of those objections to file a petition for declaratory ruling on any portion of the Union's final offer that it claims constitutes a non-mandatory subject of bargaining.

Please be advised further that, until the status of the provisions on the attached list is resolved, I am precluded by ERC 32.11(1)(b), Wis. Adm. Code from closing the investigation. I am nevertheless willing to assist the parties in achieving a voluntary settlement despite the possible filing of objections and/or a petition for declaratory ruling.

Once the dispute regarding the mandatory or permissive status of the attached provisions is resolved, I will offer each party a further opportunity to amend its final offer before I close the investigation. At some point before the close of the investigation, I will need to receive a signed copy of the tentative agreements of the parties, which Assistant Superintendent Peck agreed to provide. Please feel free to contact me if you have any questions.

Pursuant to Investigator Emery's December 13, 2001 letter, the District filed the following document with the Investigator on December 31, 2001 and then filed the instant declaratory ruling on January 10, 2002.

Pursuant to your letter of December 13, 2001, please accept this letter as service of the District's written objections to the permissive subjects, and the basis therefore, contained in the final offer made by AFSCME Local 1397, dated November 12, 2001, in the above-captioned matter. In addition, copies of this letter shall, on this same date, be served on the other party via certified mail.

Permissive Subjects

1. Article 1 – Purpose

This Article is permissive in its entirety because it does not establish any wage, hour, or condition of employment for unit members.

2. Article 6, Section 2, Paragraphs A1. and A2. – Salary Schedule-Paydays-Guaranteed Hours of Work-Shift Differential Pay-Overtime Pay.

This language is permissive to the extent that such language restricts the Board from assigning duties to employees beyond the specified starting and ending times of the workday and/or workweek, thereby limiting service level choices.

3. Article 6, Section 2, Paragraphs B1. and B2. – Salary Schedule-Paydays-Guaranteed Hours of Work-Shift Differential Pay-Overtime Pay.

This language is permissive to the extent that it restricts the Board from assigning duties to employees beyond the specified starting and ending times of the workday and/or workweek, thereby limiting service level choices.

4. Article 6, Section 2, Paragraph B3. – Salary Schedule-Paydays-Guaranteed hours of Work-Shift Differential Pay-Overtime Pay.

This language is permissive to the extent that it limits the Board's ability to eliminate and/or abolish a position.

5. Article 6, Section 2, Paragraph B4, last sentence. – Salary Schedule-Paydays-Guaranteed Hours of Work-Shift Differential Pay-Overtime Pay.

This language is permissive to the extent that it limits the Board's ability to eliminate and/or abolish the position referenced.

6. Article 6, Section 2, Paragraphs C1-C6. – Salary Schedule-Paydays-Guaranteed Hours of Work-Shift Differential Pay-Overtime Pay.

This language is permissive to the extent that it restricts the Board from assigning duties to employees beyond the specified starting and ending times of the workday, workweek, and/or work year, thereby limiting service level choices.

7. Article 6, Section 2, Paragraphs D1. and D2. – Salary Schedule-Paydays-Guaranteed Hours of Work-Shift Differential Pay-Overtime Pay.

This language is permissive to the extent that it restricts the Board from assigning duties to employees beyond the specified starting and ending times of the workday, workweek, and/or work year, thereby limiting service level choices.

8. Article 7, Section 5, Paragraph B4. – Seniority-Promotions-Assignments-Layoffs.

This language is permissive to the extent that any of the elements of the “current practice” referenced involve nonmandatory subjects of bargaining.

9. Article 7, Section 8, first sentence. – Seniority-Promotions-Assignments-Layoffs.

This language is permissive to the extent that it restricts the Board from making hiring decisions based on the qualifications it has established for such supervisory positions and/or restricts the Board from hiring non-unit candidates.

10. Article 8, Section 3, last sentence.

This language is permissive to the extent that it limits, by specific enumeration, the reasons for which the District can terminate an employee.

11. Article 8, Section 4, first sentence – Suspension and Dismissal.

This language is permissive to the extent that it limits, by specific enumeration, the reasons for which the District can terminate an employee.

12. Article 9, Section 1 – Grievance Procedure.

This language is permissive to the extent that it creates a complaint procedure that allows teachers to pursue dissatisfaction with respect to any aspect of employment and does not focus upon violations of the Agreement or upon matters which are mandatory subjects of bargaining and/or to the extent that such “rights or privileges” may relate to nonmandatory subjects of bargaining.

13. Article 22, Section 4 – General Provisions.

This language is permissive in its entirety because it does not establish any wage, hour, or condition of employment for unit members.

If you have any questions or comments about the content of this letter, please feel free to contact me.

DISCUSSION

ERC 32.11(1) and 32.12 provide in pertinent part:

ERC 32.11 Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining. (1) TIME FOR RAISING OBJECTION. Any objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing.

. . .

(b) *At time of call for final offers.* Should either party, at such time as the commission or its agent calls for and obtains and exchanges the proposed final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raise an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, the offers shall not be deemed to be final offers. The commission or its agent shall not close investigation or hearing but shall direct the objecting party to reduce the objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for the claim. Such objection shall be signed and dated by a duly authorized representative of the objecting party, and copies of the objection shall, on the same date, be served on the other party, as well as the commission or its agent conducting the investigation or hearing, in the manner and within a reasonable time as determined by the commission or its investigator, with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation does not constitute a waiver of the right to file an objection as set forth in sub. (1)(b).

ERC 32.12 Petition or stipulation to initiate a declaratory ruling proceeding to determine whether a proposal or proposals relate to mandatory subjects of bargaining. (1) WHO MAY FILE. Either party may file a petition, or both of the parties may file a stipulation, to initiate such a declaratory ruling proceeding before the commission.

(2) WHERE TO FILE. A petition or stipulation shall be filed with the commission, and if a petition is filed a copy shall be served on the other party at the same time

(3) WHEN TO FILE. A petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If a petition or stipulation is filed after the investigator calls for final offers, the petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects of bargaining.

. . .

Citing DOOR COUNTY, DEC. NO. 27158 (WERC, 2/92), AFSCME argues that the document received November 30, 2001 is the District's "written objection" within the meaning of ERC 32.12(3) and thus that any declaratory ruling had to be filed on or before December 10, 2001. The District disagrees contending that it did not file its "written objections" until December 31, 2001 pursuant to a deadline established in a December 13, 2001 letter from Investigator Emery. AFSCME counters by asserting that when Investigator Emery established a deadline for receipt of "written objections," the time for filing a declaratory ruling had already passed.

As evidenced by the above quoted text of ERC 32.11(b) and 32.12(3) and Investigator Emery's August 20, 2001 letter to the parties, our administrative rules contemplate a process by which a party: (1) can "raise" an objection that some portion of a final offer relates to a non-mandatory subject of bargaining; (2) is directed by the Commission investigator to "reduce the objection to writing" and file the written objection "within a reasonable time," and (3) files such a "written objection" which triggers the 10 day period for filing a declaratory ruling.

In DOOR COUNTY, the Commission found that by filing the following communication, the employer had in effect gone directly to step (3) above, and thereby triggered the 10 day period for filing a declaratory ruling petition.

We are hereby objecting to certain items of the bargaining unit's Final Offer as not qualifying as mandatory subjects of bargaining under Wisconsin Administrative Code ERB 31.10. They are as follows:

1. Job Posting Paragraph No. 1

AFSCME correctly points out that the Commission so found despite the fact that there, as here, the Commission's investigator did not view the communication to be a "written objection" and subsequently directed the employer to follow steps (1) and (2) above.

We continue to believe that where, as in DOOR COUNTY, the employer elects to jump directly to step (3), it is appropriate to find that the 10 day period established by ERC 32.12(3) is triggered. We further conclude that the District did jump to step (3) by its November 30, 2001 filing and thus find that the District's January 10, 2002 declaratory ruling is untimely.

As recited earlier herein, the District's November 30, 2001 filing includes a separate page entitled "Permissive Language objections to the Final Offer submitted by AFSCME, Local 1397" which goes on to expressly identify the specific contract provisions to which the District so objects. Given this District language, we conclude that the November 30, 2001 filing was the District's "written objection" within the meaning of ERC 32.12(3).

Given all of the foregoing, we have granted the AFSCME motion to dismiss based on our determination that the November 30, 2001 filing was a "written objection" that triggered the 10 day period for filing a declaratory ruling.

Dated at Madison, Wisconsin, this 17th day of May, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner