STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WESTFIELD EDUCATION ASSOCIATION, Complainant,

vs.

WESTFIELD SCHOOL DISTRICT, Respondent.

Case 21
No. 62347
MP-3934

Decision No. 30708-A

Appearances:

John D. Horn, UniServ Director, Three Rivers United Educators, P.O. Box 79, Portage, Wisconsin 53901-0079, appearing on behalf of the Complainant.

David R. Friedman, Attorney at Law, 30 West Mifflin Street, Suite 1001, Madison, Wisconsin 53701, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 30, 2003, the Westfield Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the Westfield School District had violated Section 111.70(3)(a)4, Stats., by unilaterally changing working conditions and Section 111.70(3)(a)1, Stats., by engaging in conduct that tends to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in Section 111.70(2), Stats. On September 17, 2003, the Commission appointed Coleen A. Burns, an Examiner on its staff, to conduct a hearing and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sections 111.70(4)(a) and 111.07, Stats. A hearing was held on January 29, 2004, in Westfield, Wisconsin. The hearing was transcribed and the record was closed on April 1, 2004, upon receipt of post-hearing briefs. The Examiner, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Westfield School District, hereafter District or Respondent, is a municipal employer with principal offices located at N7046 County Road "CH", Westfield, Wisconsin 53964. At all times material hereto, Dr. Greg Peyer has been the District Administrator of the Respondent.

2. Westfield Education Association, hereafter Association or Complainant, is the exclusive collective bargaining representative of teachers employed by the Respondent. The Complainant's principal offices are located at 104 West Cook Street, Suite 103, P.O. Box 79, Portage, Wisconsin 53901-0079. At all times material hereto, Mr. John D. Horn, UniServ Director, Three Rivers United Educators, has represented the Complainant for purposes of labor contract negotiations and administration.

3. On December 15, 1993, the Westfield Board of Education, hereafter Board, enacted a policy entitled "Professional Attitude and Ethics," which includes the following:

> Teachers are invited to take an active part in such duties as assisting in curriculum revisions, sponsoring school and class projects, and all other worthwhile educational endeavors. School administrators are authorized to assign staff members to participate in such activities when these duties are clearly necessary to the well-being of the schools of the district.

All District teachers sign an individual contract. Since the 1992-93 school year, this individual contract has contained the following:

> IT IS FURTHER AGREED that this contract is made and shall remain subject to the provisions Sec. 118.21 and 118.22 and other applicable provisions of the Wisconsin Statutes, as revised, and to the rules, regulations and policies of the Board, and the Teacher agrees to, in all respects, abide by and comply with the same.
>
> The parties hereto agree that this agreement constitutes a binding, legal contract for the term set forth, the breach of which, by either party, will result in liability for damages to the other as per the conditions of the MASTER CONTRACT. This contract shall be subject to amendment by subsequent collective bargaining agreements.

The individual contract for an elementary teacher states that the teacher is to perform services as an Elementary Teacher and for a specified salary sum. The specified salary sum includes a base wage and extra duty amounts, if applicable. Prior to and after 1997, elementary teachers

have attended elementary school concerts that were held outside of the teacher's normal workday. The individual contract does not identify attendance at elementary school concerts as an Elementary Teacher service for which the base wage is paid. Nor does it state that such attendance is an extra duty for which an extra duty amount is applicable.

4. Since at least 1968, there has been a bargaining relationship between the Complainant and the Respondent. The most recently signed collective bargaining agreement between the Complainant and the Respondent is, by its terms, in effect from July 1, 1999 until June 30, 2001. Article IV(B) of this collective bargaining agreement contains an "Extra Curricular Activities Pay Schedule" that identifies various activities, primarily relating to athletics, and assigns pay to the identified activities. Article IV(C) of this collective bargaining agreement contains a "Voluntary Extra Assignment Schedule" that identifies one activity, *i.e.*, "Noon Hour Supervision," and assigns pay to that activity. Article IV(D) of this collective bargaining agreement addresses "Extra Assignments" and assigns a pay rate to each activity that is identified as an "Extra Assignment." Article IV(D) states " Principals shall seek volunteers for all extra assignments. If no volunteers are found, then the principal may assign the extra assignments as equitable as possible." This expired agreement does not identify attendance at elementary school concerts as an Article IV(B) "Extra Curricular Activity;" an "Article IV(C) "Voluntary Extra Assignment;" or an Article IV(D) "Extra Assignment." The language of this expired agreement neither identifies a pay rate for attendance at elementary school concerts, nor states that such attendance is a required duty for which the teacher receives his/her base wage. This expired agreement contains a grievance procedure that culminates in final and binding arbitration. By letter dated June 25, 2002, WERC Investigator David Shaw advised the parties of the following:

> . . . I conclude that the parties are at deadlock within the meaning of Sec. 111.70(4)5s, Stats., and ERC 33.10(5)(a), Wis. Adm. Code.

5. During contract negotiations and by letter dated November 18, 1997, Association President Lueck notified District administration of the following:

> Since the winter programs/concerts are not held during contracted hours, we have decided not to actively participate. One way to alleviate the problem caused by our lack of participation would be to hold the programs/concerts during contracted hours.

On or about December 9, 1997, District Administrator Paul Zavada issued a memo regarding "Winter elementary vocal concerts" to "Parents, relatives and interested parties" that includes the following:

> We have been advised by the teachers union that some or all the teachers may choose to boycott the winter concerts if those concerts are held in the evening. Due to the short notice we are not certain we can make alternate arrangements. Thus, we will be having the concerts during the school day. . .

On or about December 11, 1997, Zavada issued a memo that includes the following:

> The Board of Education met Wednesday night regarding the status of the Holiday Concerts. In light of the response we have already had from the public, including offers to volunteer at the concerts, the Board and Dr. Zavada has decided to hold the concerts in the evenings as scheduled. Because the teachers have informed us that they will not be attending, we are asking for volunteers. If you are willing to volunteer to supervise children or in any other capacity, please call your building principal AS SOON AS POSSIBLE. He/she will let you know when and where you should report.
>
> Thank you for your help in having the concerts at a time when our children and their parents and relatives can most enjoy them.

In December of 1997, the Respondent held the elementary school concerts outside of the elementary teachers' normal work day, as previously scheduled, and did not require these teachers to attend the elementary school concerts. In December of 1997, the parties reached a tentative agreement on their 1997-1999 collective bargaining agreement. On or about February 12, 2002, Association President Marcia VanNatta issued a letter to the District administration that includes the following:

> Because the District does not seem interested in reaching a voluntary settlement with the WEA, I have been directed by the members of the Association to notify you that all voluntary, noncompensated activities that are not a direct extension of the curriculum will end immediately. The following activities will not be performed by the WEA members for the remainder of the 2001-2002 school year: high school track meets, recognition night, 8th grade graduation, DARE graduation, dance chaperones, art show, after school 7-8 softball practice and before and after school meetings.

Peyer did not provide any written response to the above document.

6. On or about September 9, 2002, Association President Andrew Polk issued a letter to the Respondent's Board and administrators that includes the following:

> Due to the Board's decision to implement a QEO, which included a reduction in pay for all teachers, we will no longer provide any volunteer activities which occur before 7:30 AM or after 3:30 PM during school days, for Coloma and Oxford before 7:50 AM or after 3:50 PM for Westfield Grade School, Westfield Elementary School, Westfield Middle School, and Pioneer Westfield High School. Below is a listing of activities, which we will no longer be performing:
>
> - Monday Night Detention
> - Concessions
> - Club advisorship responsibilities
> - Curriculum work
> - Prom supervision
> - Homecoming supervision
> - Dances
> - Graduation
> - Faculty meetings
> - IEP meetings
> - Parent Meetings
> - Student requests
> - Awards Night
> - Scholarship selection committee
> - Financial aid night
> - Class supervision at elementary concerts
> - Open House

Peyer did not provide any written response to the above document and never agreed that it was accurate. On or about December 3, 2002, Peyer informed Polk that, based on the Board's "Professional Attitude and Ethics" policy and the individual teacher contract language, teachers would be required to attend the elementary holiday concerts. Polk asked if teachers would be disciplined if they did not attend and Peyer responded "Yes." Polk then advised Peyer that teachers would do the assignment, but would expect pay and if not paid would grieve the failure to pay. Subsequently, the Respondent's Elementary School Principals required all elementary teachers to attend the December 2002 elementary school concerts. The purpose of this attendance was to supervise and control a classroom of students in the classroom, in the hallway and in the gymnasium where the concerts are held. Respondent required the elementary teachers to provide such supervision and control because the teachers are familiar with the performance to be presented; have the most knowledge of individual student behaviors; and have the most knowledge of how to deal with these behaviors. To some extent, the elementary classroom teacher prepares the students for the concert, but the elementary music teachers have the primary responsibility for such preparation. The December 2002 elementary school concerts were held outside of the teachers' normal workday. Approximately thirty (30) of the fifty-two elementary teachers required to attend the

concert submitted a request to be paid for such attendance. The teachers who submitted a request received a letter similar to a letter issued by District Elementary School Principal Kathy Gwidt on December 18, 2002, which states as follows:

> The annual Holiday Concert is an integral part of the instruction students receive in our classrooms throughout the school year. The attendance of teachers at this concert has been a long standing practice and a clear expectation of a teacher's duties. As such, you were assigned to participate in this activity as a duty necessary to the well being of the schools of the district (Board Policy 4004). As indicated on your individual contract, you are required to adhere to all Board Policies and I am hereby denying your request for reimbursement for the Holiday Concert on December 12, 2002.

7. On or about January 16, 2003, the Complainant submitted a timely group grievance, which states as follows:

> I write on behalf of the Westfield Education Association's Grievance Committee regarding the District's failure to pay teachers who were directed to attend and supervise the Holiday Concerts in each of the four School District of Westfield elementary schools during December of 2002.
>
> The Grievance Committee has reviewed the denial of payment for the teacher's who were directed to attend these concerts and the teacher's possible grievances and in the judgment of the Grievance Committee all affected teachers are similarly situated and are a class of employees. Thus, please consider this the written group grievance pursuant to Article VI (Grievance Procedure), C,5.
>
> Directing a teacher to work beyond the understood hours of work doing a duty, which has been understood to be voluntary, without compensation, adversely affects the wages, hours and conditions of employment of this class of teachers.
>
> To remedy this grievance make all affected employees whole in every way including but not limited to paying them at least an amount equivalent to two hours salary at their rate based on the teacher's placement on the salary schedule at the time of the Holiday Concert.

The Respondent denied the group grievance. The Complainant has exhausted its obligations under the grievance procedure contained in the parties' expired 1999-2001 collective bargaining agreement. Prior to filing this grievance, Peyer and Polk met in an attempt to informally resolve the issue. At this meeting, the Complainant indicated that the issue could be resolved with an agreed pay rate for the assignment. On May 5, 2003, following negotiations

between the Association's chief negotiator and Peyer, the parties executed a Memorandum of Understanding that includes the following:

> 1. The parties agree to modify Article IV (Salary, Extra Pay and Fringe Benefit Schedules), B (Extra Curricular Activities Pay Schedule) by the addition of the following:
>
> Middle School Musical:
>
> | | |
> |---|---|
> | Musical Director | $700.00 |
> | Vocal Director | $500.00 |
> | Art Director | $500.00 |
>
> 2. The parties agree to modify Article IV, (Salary, Extra Pay and Fringe Benefit Schedules), D (Extra Assignments) of the Agreement by the addition of the following:
>
> | | |
> |---|---|
> | Track and Cross Country Workers | $15.00 per event |
> | Dance Chaperones | 23.00 per event |

It is further understood that this addition shall be a part of the *status quo* related to the 1999-2001 Agreement and will be made a part of the successor Agreement.

8. At the time that the Respondent required elementary teachers to attend the 2002 elementary school winter/holiday concerts, such attendance was voluntary and not a required duty for which the teacher received his/her base wage. The parties have not bargained a wage rate for such attendance. The elementary teachers who were required to attend the 2002 elementary school holiday concerts were engaged in the supervision and control of students who were engaged in a classroom activity. The supervision and control of students engaged in a classroom activity is fairly within the scope of responsibilities applicable to the kind of work performed by the Respondent's elementary teachers.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Respondent Westfield School District is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and District Administrator Dr. Gregory J. Peyer acts on behalf of the Respondent.

2. Complainant Westfield Education Association is a labor organization within the meaning of Section 111.70(1)(h), Stats., and Association President Andrew Polk acts on behalf of the Complainant.

3. Respondent's decision, in December 2002, to require elementary school teachers to attend elementary school concerts held outside of the teachers' normal workday is a permissive subject of bargaining and, therefore, Respondent did not unilaterally change the *status quo* on a mandatory subject of bargaining when it required elementary teachers to attend these concerts.

4. When Respondent, in December of 2002, required its elementary school teachers to attend elementary school concerts held outside of the teachers' normal workday, Respondent unilaterally changed the *status quo* on a permissive subject of bargaining during a contract hiatus period.

5. Pay for the elementary teachers' attendance at the December 2002 elementary school concerts primarily relates to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining.

6. In December 2002, when Respondent required elementary teachers to attend elementary school concerts held outside of the teachers' normal workday, the *status quo* on pay for such attendance was not that it was compensated as part of the teachers' base wage, but rather, that the parties had not bargained a pay rate for such attendance.

7. In rejecting Complainant and elementary teacher requests for payment for required attendance at the December 2002 elementary school concerts, Respondent has not unilaterally changed the *status quo* on a mandatory subject of bargaining.

8. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Complainant made a request to bargain with Respondent over pay for teachers required to attend the December 2002 elementary schools concerts.

9. Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a)4 and (1), Stats., as alleged by Complainant.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

Complainant Westfield Education Association's complaint of prohibited practices is dismissed in its entirety.

Dated at Madison, Wisconsin, this 6th day of October, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

WESTFIELD SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 30, 2003, Complainant filed a complaint of prohibited practices alleging that the Respondent has refused to bargain collectively in violation of Section 111.70(3)(a)4 and (1), Stats. Respondent denies that it has committed the prohibited practices alleged by the Complainant.

POSITIONS OF THE PARTIES

Complainant

By requiring Complainant's bargaining unit employees to chaperon students at the 2002 Elementary School Holiday Concerts, the Respondent required work that had been voluntary and, thus, altered the *status quo* on a mandatory subject of bargaining in violation of its statutory duty to bargain. The Respondent committed further refusals to bargain when it rejected requests to be paid for the required work and, correspondingly, refused to bargain an appropriate pay rate with the Complainant after the Complainant had, on at least four occasions, demanded to negotiate a pay rate for the newly-required extra assignment.

The Respondent should be found to have committed the prohibited practices alleged by the Complainant. Further, the Respondent should be ordered to: cease committing such prohibited practices; make all employees in the bargaining unit whole including, but not limited to, pay for working the December 2002 holiday concerts and any other loss of wages, fringe benefits and pension contributions, with interest at the prevailing rate; reimburse the Complainant for its attorney's fees and other costs of this action; and post the appropriate compliance notices. The Respondent should also be ordered to take any other remedial action is deemed appropriate by the Examiner.

Respondent

Complainant has to establish the *status quo* with respect to a mandatory subject of bargaining and then prove, by the clear and satisfactory preponderance of the evidence, that the Respondent unilaterally altered this *status quo* in violation of Sec. 111.70(3)(a) 4 and 1, Stats. Complainant has not met either burden.

Since 1993, teachers have been required to, and have attended, elementary school concerts without receiving any additional pay for such attendance. It is well-settled law in Wisconsin that, if a particular duty is fairly within the scope of responsibilities applicable to

the kind of work performed by the employees involved, the decision to assign such work to such employees is a permissive subject of bargaining. There cannot be a violation of the duty to bargain if the subject is not a mandatory subject of bargaining. The Respondent respectfully submits that the complaint be dismissed in its entirety.

DISCUSSION

It is undisputed that, during a contract hiatus period, the Respondent required its elementary school teachers to attend the Respondent's December 2002 elementary school holiday concerts and that these concerts were held outside of these teachers' normal workday. The Complainant, contrary to the Respondent, argues that the Respondent has violated Sec.111.70(3)(a)4 and 1, Stats., by unilaterally altering the *status quo* on a mandatory subject of bargaining by requiring attendance that had been voluntary; by rejecting requests to be paid for the required work; and by refusing to bargain an appropriate wage rate when the Complainant demanded that it bargain such rate.

As the Respondent argues, the alleged Sec. 111.70(3)(a)1 violation is derivative of the alleged Sec. 111.70(3)(a)4 violation. Thus, to prevail upon its Sec. 111.70(3)(a)1 claim, the Complainant first must establish its Sec. 111.70(3)(a)4 claim.

Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.
>
> . . .

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

In WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), the Commission summarized the law as follows:

> 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. 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) AFFIRMED 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). 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, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA.

In its decision, the Commission went on to note that:

> [A] status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. SAINT CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA.

Mandatory subjects of bargaining are those that "primarily relate" to wages, hours and conditions of employment, while permissive subjects of bargaining are those that "primarily relate" to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 Wis.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 Wis.2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis.2D 43 (1976).

The Complainant concedes that the Respondent has the statutory authority to schedule elementary concerts outside of the contract hours of teachers and to decide if it is in the best interest of the educational process to require staff to attend these concerts to chaperon students. The Complainant, however, does not identify the basis of this statutory authority. To determine the merits of the Complainant's claim that the Respondent has unilaterally altered the *status quo* on a mandatory subject of bargaining by requiring attendance at the December 2002 elementary school holiday concerts, it is necessary to determine whether or not the Respondent's decision to require such attendance is a permissive or mandatory subject of bargaining.

As set forth on MILWAUKEE SEWERAGE COMMISSION, DEC. NO. 17302 (WERC, 5/79):

> . . . if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved, the decision to assign such work to such employees is a permissive subject of bargaining. Only when the duties involved are not fairly within that scope does the matter of whether

> the employees may be assigned such work become a mandatory subject of bargaining.

This test has been reaffirmed [WHITNALL SCHOOL DISTRICT, DEC. NO. 20784-A (WERC, 5/84); GREENFIELD SCHOOL DISTRICT, DEC. NO. 26427 (4/90); CITY OF GLENDALE, DEC. NO. 27907 (1/94)], with the caveat that it is not applicable to duties "which, although performed by employees on an occasional basis, remain 'supplemental to and supportive of', rather than an integral part of, the employe's primary responsibilities and duties." FRANKLIN SCHOOL DISTRICT, DEC. NO. 21846 (WERC, 7/84). This test has been applied to assignments within the normal workday, as well as to assignments outside of the normal workday. RACINE SCHOOL DISTRICT, DEC. NO. 20652-A,20653-A (WERC, 1/84).

According to the District Administrator, the Respondent interest being served by the attendance requirement is the supervision and control of a classroom of students in the classroom, in the hallway and in the gymnasium where the concert is held and that the elementary teachers are the individuals that are best able to provide such supervision and control because they are familiar with the performance to be presented and with the individual behaviors of the students. The record does not demonstrate otherwise.

The Examiner is satisfied that the elementary teachers who were required to attend the 2002 elementary school holiday concerts were engaged in the supervision and control of students who were engaged in a classroom activity. The duty of supervising and controlling students engaged in this classroom activity (hereafter referred to as chaperoning) is fairly within the scope of responsibilities applicable to the kind of work performed by the Respondent's elementary teachers. Accordingly, the Respondent's decision to require elementary school teachers to attend the December 2002 elementary school holiday concerts is a permissive subject of bargaining. Regardless of whether or not the teachers had previously volunteered to perform such work, the Respondent did not unilaterally change the *status quo* on a mandatory subject of bargaining when it required elementary teachers to chaperon at the 2002 elementary school holiday concerts.

The undersigned turns to the issue of whether or not the Respondent violated its statutory duty to bargain by rejecting requests to be paid for the required chaperoning and/or by refusing a Complainant demand to bargain an appropriate wage rate for the required chaperoning. The Examiner first considers the rejection of requests for payment.

Some, but not all, of the elementary teachers who were required to chaperon at the elementary school concerts requested to be paid additional monies for such work and all such requests were denied. On or about January 16, 2003, the Complainant filed a grievance on the denial of these requests for payment. In this grievance, the Complainant requested, *inter alia*, that all affected teachers be paid "at least an amount equivalent to two hours salary at their base rate." The Respondent denied this grievance request.

The Respondent asserts that chaperoning at the elementary school concerts has always been a required duty for which the teacher received his/her base wage and, thus, by denying requests to be paid additional compensation for such chaperoning, the Respondent has not unilaterally changed the *status quo*. The Complainant responds that, with the exception of 1997, when the teachers did not volunteer to chaperon at the holiday concerts, all such chaperoning has been voluntary and not an unpaid requirement.

The January 16, 2003 grievance was filed during a contract hiatus period and grieves matters that arose during the contract hiatus period. In CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77), the Commission held that grievance arbitration is not one of the *status quo* conditions that must be maintained during a contract hiatus. Therefore, upon expiration of the collective bargaining agreement, neither party can be compelled to submit to grievance arbitration over matters that arise during the hiatus. In RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98), the Commission expanded upon GREENFIELD, as follows:

> Reviewing the policy considerations recited in GREENFIELD, we are persuaded that exhaustion of the status quo grievance procedure should be required as a pre-condition to assertion of jurisdiction over duty to bargain complaints which allege a violation of the status quo. As these parties and this case establish, labor peace is poorly served when parties can ignore an existing dispute resolution mechanism which is part of the status quo and turn to lengthy and expensive litigation as a matter of right. Thus, as to all complaints filed after the date of this decision, we will not assert jurisdiction over alleged violations of the status quo unless any applicable grievance procedure contained in the expired contract has been utilized and exhausted. 1/ Because this requirement is new and not foreshadowed by existing precedent [*BROWNE V. WERC 169 WIS.2D 79, 112 (1992)]*, it is not appropriate to apply it to this proceeding and we have not done so. 2/

1/ Because grievance arbitration is not part of the status quo, SEE GREENFIELD, SUPRA, neither party can compel the other to arbitrate grievances which arise during the contract hiatus. However, agreement to use arbitration has the potential to provide the parties with a prompt and inexpensive resolution of contract hiatus grievances.

2/ We also acknowledge that Respondents made a claim preclusion argument to the Examiner which she rejected. Because we need not reach that issue to decide this case, we make no comment on whether claim preclusion is applicable herein or whether the Examiner properly applied the doctrine (assuming its applicability).

It is not evident that the parties have an agreement to arbitrate matters that arise during the contract hiatus period. The parties have stipulated that the Complainant has exhausted the *status quo* grievance procedure. Accordingly, it is appropriate for the Examiner to determine whether, by rejecting the payment requests, the Respondent has violated its statutory duty to maintain the *status quo* on mandatory subjects of bargaining during a contract hiatus period.

Pay for chaperoning at the elementary school concerts "primarily relates" to teacher wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining. Therefore, during the contract hiatus period, the Respondent has a statutory duty to maintain the *status quo* on pay for such chaperoning. In order to determine whether or not the Respondent has changed this *status quo* by refusing requests for pay for chaperoning at the elementary school concerts, the Examiner must first identify the *status quo* on pay for such chaperoning.

As is discussed above, a *status quo* analysis requires the Examiner to consider the language of the expired agreement, any practice, and any bargaining history. As is also discussed above, a *status quo* analysis is different than a grievance arbitration analysis. Thus, the instant dispute is not governed by the arbitral precedent relied upon by the Complainant.

Since at least 1968, there has been a bargaining relationship between the Complainant and the Respondent. The language of the most recently signed collective bargaining agreement between the Complainant and the Respondent, which the parties have stipulated is expired, provides extra pay for a variety of activities, but does not provide extra pay for chaperoning at elementary school concerts. The language of this contract also provides a base salary schedule wage, but does not identify such chaperoning as a duty for which the teacher receives his/her base wage. Inasmuch as the language of the expired agreement is ambiguous with respect to the issue of pay for chaperoning at elementary school concerts, the undersigned turns to the evidence of practice and bargaining history.

Prior to 1997, elementary teachers chaperoned at elementary school holiday concerts that were held outside of teacher's normal workday. It is not evident that, prior to 1997, any teacher received compensation in addition to his/her base wage for such chaperoning. Nor is it evident that, prior to 1997, the parties had any discussion of pay for such chaperoning, including whether such chaperoning is voluntary or a required duty for which the teacher receives his/her base wage.

By letter dated November 18, 1997, the Complainant advised the Respondent that the Association's members would not actively participate in winter programs/concerts that are not held during the teacher's contracted hours. In December of 1997, the Respondent initially rescheduled the elementary school concerts to be held within the teacher's normal workday and then reverted to the former schedule in which the concerts were held outside the teacher's

normal workday. It is also evident that the Respondent solicited volunteers and did not require teachers to chaperon at the 1997 elementary school concerts.

In December of 1997, the parties reached a tentative agreement on their 1997-1999 agreement. It is not evident that, prior to reaching this agreement, the Respondent denied that chaperoning was voluntary, or provided the Complainant with any notice that the Respondent considered chaperoning at elementary school concerts to be a required duty for which the teacher receives his/her base wage.

From 1998 through 2001, elementary teachers chaperoned at elementary school concerts that were held outside of the teachers' normal workday. The record fails to establish that, during this time period, the Respondent and the Complainant had any further discussions, or exchanges, on the issue of pay for chaperoning at elementary school concerts, including whether such chaperoning was voluntary or a required duty for which the teacher received his/her base wage.

In February of 2002, the Association President advised the Respondent that "all voluntary, noncompensated activities that are not a direct extension of the curriculum will end immediately." The Association President identified certain volunteer activities that would not be performed for the remainder of the 2001-02 school year, but did not express any change in position with respect to chaperoning at the December 2002 elementary school concerts.

On or about September 9, 2002, the Complainant sent a letter to the Respondent. This letter advised the Respondent that teachers would no longer volunteer for activities occurring before and after the normal workday and identified "class supervision at elementary concerts" as one of these volunteer activities. It is not evident that the Respondent made any response regarding such "class supervision" until early December of 2002, at which time the District Administrator advised the Association President that, based on the Board's "Professional Attitude and Ethics" policy and language in the individual teaching contract, teachers would be required to attend the elementary holiday concerts. After confirming that teachers would be disciplined if they did not attend, the Association President responded that teachers would do the assignment, but would expect pay and if not paid would grieve the failure to pay. After the Respondent failed to pay any additional monies for the required attendance, the Association filed the grievance of January 2003.

On May 5, 2003, the parties executed a Memorandum of Understanding. This MOU modifies Article IV to include additional pay for some of the activities that the Complainant had previously identified as voluntary. Contrary to the argument of the Respondent, the fact that this MOU expressly states that the additions contained in the MOU "shall be part of the *status quo"* is not an acknowledgment of any *status quo* with respect to chaperoning at elementary school concerts. Nor does the evidence of this MOU establish that the

Complainant made any admissions concerning the *status quo* of chaperoning at the December 2002 elementary school concerts, or that the Complainant has waived any right to bargain with the Respondent on pay for chaperoning at elementary school concerts.

As the Respondent argues, since the 1992-93 school year, the Board's "Professional Attitude and Ethics" policy has contained the following:

> Teachers are invited to take an active part in such duties as assisting in curriculum revisions, sponsoring school and class projects, and all other worthwhile educational endeavors. School administrators are authorized to assign staff members to participate in such activities when these duties are clearly necessary to the well-being of the schools of the district.

and the individual teacher's contracts have contained the following:

> IT IS FURTHER AGREED that this contract is made and shall remain subject to the provisions Sec. 118.21 and 118.22 and other applicable provisions of the Wisconsin Statutes, as revised, and to the rules, regulations and policies of the Board, and the Teacher agrees to, in all respects, abide by and comply with the

It may be, as the Respondent argues, that chaperoning at elementary school concerts is a duty that is "clearly necessary to the well-being of the schools of the district." One may, however, possess a right without exercising that right. Notwithstanding the Respondent's argument to the contrary, neither the language of above cited Board policy, nor the language of the individual teacher contract, provides a reasonable basis to conclude that the parties have a practice, or any understanding, with respect to pay for chaperoning at elementary school concerts.

At hearing, Andrew Polk testified that, as Association President, he thought that attendance at the elementary school concerts was an expectation. Polk, however, qualified this answer by stating that, until December 2002, he did not consider it to be a requirement. (T. at 26)

In summary, in 1997, when the Complainant placed the Respondent on notice that chaperoning at elementary school concerts held outside of the normal workday was voluntary, the Respondent offered no objection; did not require teachers to chaperon at the 1997 concerts; and, following notification of the Complainant's position, entered into a collective bargaining agreement without any apparent discussion of the issue of chaperoning at elementary school concerts. It is reasonable to conclude, therefore, that as of 1997, the *status quo* on chaperoning at elementary school concerts held outside of the teachers' workday was that it was voluntary and not a required duty for which the teacher received his/her base wage. It is

not evident that, from 1997 until the Respondent required elementary teachers to attend the December, 2002 elementary school concerts, the parties reached any other agreement, or mutual understanding, with respect to chaperoning at elementary school concerts that are held outside the teachers' normal workday.

In conclusion, the language of the expired agreement, practice, and bargaining history fails to establish a *status quo* in which chaperoning at elementary school concerts held outside of the teachers' workday is a duty for which the teacher receives his/her base wage. Rather, such evidence establishes a *status quo* in which such chaperoning is a voluntary duty for which the parties have not bargained a pay rate. Given the absence of any bargained pay rate, the Respondent did not unilaterally change the *status quo* on a mandatory subject of bargaining during a contract hiatus period when it denied employee and Association requests for payment for chaperoning at the 2002 elementary school concerts.

Inasmuch as the 2002 elementary school concerts were held outside the teacher's normal workday and, previously, chaperoning at such concerts had been voluntary, the Respondent made a unilateral change in a permissive subject of bargaining when it required its elementary teachers to chaperon at these concerts. In CITY OF MADISON, DEC. NO. 17300-C(7/83), the Commission held that a municipal employer that unilaterally changes a permissive subject of bargaining, may have a duty to bargain the impact of the change on the wages, hours, and working conditions of employees, but that such bargaining is not a condition precedent to the implementation of that permissive subject of bargaining. The Commission added the caveat that, in some cases, the parties' rights and obligations to bargain impact matters "at reasonable times" may require that bargaining over impact commence prior to implementation. However, a municipal employer's obligation to bargain such an impact is dependent upon the extent of the labor organization's request in that regard. ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93); AFF'D DEC. NO. 27215-D (WERC, 7/93), AFF'D (CTAPP III) 186 WIS.2D 671(1994).

Relying upon Stipulations of Fact 12, 13, 14, 15 and Jt. Ex. #10, the Complainant argues that the Complainant, on at least four occasions, requested that the Respondent bargain with the Complainant over the compensation to be paid to the elementary teachers for required attendance at the 2002 elementary school concerts. The Stipulations relied upon by the Complainant state as follows:

> 12. Thereafter, Association President Polk informed District Administrator Peyer that he understood that teachers were required to attend or would be disciplined, so teachers would do the assignment, but would expect pay and if not paid would grieve the failure to pay.

13. On Wednesday, January 8, 2003 the Association met with District Administrator Dr. Greg Peyer in an attempt to resolve the issue informally, without filing a written grievance. Including the Association indicating the issue could be resolved with an agreed pay rate for the assignment.

14. By letter dated January 16, 2003 the Association submitted a timely group grievance of the failure to pay Dr. Greg Peyer (Joint Exhibit 10), which was denied by Dr. Peyer by letter dated January 28, 202. (Joint Exhibit 11).

15. The District stipulates that for the purposes of this prohibited practice hearing, the Westfield Education Association has exhausted its obligations under the grievance procedure of the expired 1999-2001 collective bargaining agreement.

Jt. Ex. #10 is the written grievance that was filed on January 16, 2003.

Stipulation 12 is a statement of intent to file a grievance if teachers who were required to chaperon were not paid for chaperoning. Stipulation 13 is an offer of settlement to avoid a grievance. Jt. Ex #10 is the grievance, which contains a request to make employees "whole," including the payment of an amount equivalent to two hours salary.

As set forth above, the party on whom the burden of proof rests is required to sustain such burden by a clear and satisfactory preponderance of the evidence. Notwithstanding the Complainant's argument to the contrary, the evidence of Complainant conduct reflected in Stipulations 12 through 15 and Jt. Ex. #10 does not establish that the Complainant made a request to bargain with the Respondent over pay for chaperoning at the elementary school concerts.

Conclusion

The Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent has violated Sec. 111.70(3)(a)4 or 1, Stats., as alleged by the Complainant. Accordingly, the Complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 6th day of October, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

CAB/gjc
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