

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
BERLIN SCHOOL DISTRICT

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

BERLIN SUPPORT STAFF ASSOCIATION

Case 22
No. 62602
DR(M)-641

Decision No. 30791

Appearances:

William G. Bracken, Employment Relations Services Coordinator, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Berlin School District.

Melissa A. Cherney and **Nancy J. Kaczmarek**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Berlin Support Staff Association.

ORDER DENYING MOTION TO DISMISS

On August 5, 2003, the Berlin Area School District (School District) filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(b), Stats., seeking a declaratory ruling that certain portions of a final offer submitted by the Berlin Support Staff Association (Association) are permissive subjects of bargaining.

On September 2, 2003, the Association filed a motion to dismiss the petition as untimely.

On September 26, 2003, the parties filed a stipulation of facts to be applied to the motion.

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The parties thereafter filed written argument -- the last of which was received December 5, 2003.

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

ORDER

The motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Berlin Area School District

MEMORANDUM ACCOMPANYING ORDER

BACKGROUND

The Association and the School District initiated the interest arbitration process on May 22, 2001. For about a year and a half, the Commission's investigator worked with the parties to reach a voluntary settlement before calling for the initial exchange of final offers on November 27, 2002. By April, 2003, the parties were still in the process of exchanging offers and the Association submitted a version of its final offer on that date. By e-mail dated May 2, 2003, addressed to the Association's representative and copied to the investigator, the School District stated as follows:

The Berlin Area School District objects to the reference in your final offer dated April 30, 2003 in Sections 9.1 and 9.2, subsection A, to the 'WEA Insurance Trust.' We believe this to be a permissive subject of bargaining and one that we need not bargain nor allow an interest arbitrator to consider. We request that the investigator not close the investigation while this objection stands. Please advise as to how the Union plans to respond to our objection.

Having received no response to the May 12 e-mail, the District sent another e-mail, this one dated July 29, 2003, addressed to the Association representative and copied to the investigator, stating as follows:

Before I submit our next offer I would request that you respond to my objection to the naming of the insurance carrier ... I sent you an email on May 12, 2003 and have not heard from you as to the Union's position on this issue. Please let me know if the Union will voluntarily delete this reference from your offer. I need to know this before I send in our next offer. Thanks.

The next morning, the District sent the following e-mail to the Association, copied to the investigator:

Please confirm the Union's last 'official' final offer. I am not certain if it is one of the offers the parties explored in settlement discussions or if you re-submitted your 4/30/03 offer. Please clarify. Thanks.

About an hour later, the Association responded with the following e-mail, copied to the investigator:

At this time, it is the one dated April 30, 2003. The BSSA bargaining team is meeting Friday afternoon. If I am in receipt of your final offer by Friday morning that would be very helpful to the process.

Minutes later, the District responded with an e-mail asking, "What about the permissive item?" The Association answered a few hours later on the same day, July 30, 2003, as follows:

While we believe the time limits to file a declaratory ruling have passed as it relates to the mandatory/permissive nature of our health insurance proposal, as a part of a voluntary agreement we may be willing to address the District's concern about naming the carrier. I will discuss this with the bargaining team on Friday afternoon along with the rest of your offer, that I hope to have received prior to the meeting.

Neither of the last two e-mails were copied to the investigator. By letter dated July 31, 2003, the District asked the Commission's investigator:

to establish a timetable for the District to object to the proposal pursuant to ERC 32.11. . . . Inasmuch as the investigation has not been closed and you have not directed me to reduce the objection to writing, we ask that you establish a reasonable time for the District to comply with above rule. . . .

By letter dated August 5, 2003, the investigator acknowledged receipt of the District's letter and advised the parties as follows:

I received Mr. Bracken's letter dated July 31, 2003, on August 1, 2003, and left him a message after business hours essentially containing the following information.

Mr. Bracken has requested that I set a 'timetable' for his filing of a formal objection (DR) to the Association's identification of the WEAIT as the insurance carrier in its offer of April 30, 2003, concerning the first contract in the

captioned case. The investigation in this case is not closed and the parties have been exchanging final offers for some time.

In this kind of situation I have extremely limited authority and I make no judgments regarding the basis or merits of Mr. Bracken's assertions in his July 31st letter. Rather, I refer the parties to ERC Sections 32.11 and 32.12, Wis. Admin. Code.

Pursuant to Section 32.12(3), Mr. Bracken must file his DR with the Commission in Madison 'within 10 days' of his service on me of his written objection dated July 31st, following ERC Chapter 18 regarding DR's.

Thank you for your cooperation.

(Emphasis added).

DISCUSSION

Citing ERC 32.11(1) and 32.12, Wis. Admin. Code, the Association asks us to dismiss the declaratory ruling petition because it was not timely filed within 10 days following service of a written objection. The rules 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.

. . .

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.

. . .

These administrative rules contemplate a process by which a party: (1) may raise an objection that some portion of a final offer relates to a non-mandatory subject of bargaining; (2) is then directed by the Commission investigator 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” and file and serve the written objection “within a reasonable time,” and (3) files and serves such “written objection,” triggering a 10 day period for filing a petition for declaratory ruling.

The Commission has previously held that a party could “jump to step 3” of this process by making its initial objection in writing. *SUPERIOR SCHOOL DISTRICT*, DEC. NO. 30347 (WERC, 5/02); *DOOR COUNTY*, DEC. NO. 27158 (WERC, 2/92). In those decisions, the Commission held that employers who, during the process of exchanging and revamping final offers, had sent a letter objecting to certain provisions of the unions’ final offers, had fulfilled

the requirements of a “written objection” and had thereby unwittingly triggered the 10 day period for filing a declaratory ruling petition. The Commission therefore dismissed the subsequently-filed petitions for declaratory ruling as untimely.

In the present case, the Association asks us to expand SUPERIOR SCHOOL DISTRICT and DOOR COUNTY to an employer’s e-mailed objection to a portion of the Association’s final offer and to dismiss the instant Petition for Declaratory Ruling because it was filed more than 10 days after the e-mailed objection. We conclude that SUPERIOR SCHOOL DISTRICT and DOOR COUNTY were unnecessarily strict interpretations of the Commission’s rules, and we hereby overturn those decisions. 1/

1/ Because we decide that the School District’s e-mail of May 12 would not satisfy the requirements of ERC 32.11 (1)(b) whether or not it is viewed as a “written” objection, we need not decide whether an investigator could allow a party to use e-mail as the means of communicating its written objection for purposes of that rule. We note, however, that the rule gives the investigator authority to designate the “manner” in which the written objection can be filed and served and that nothing in the Commission’s rules or procedures would appear to preclude this method of communication, if the investigator deems it effective and appropriate.

Because we depart from the Commission’s holdings in SUPERIOR SCHOOL DISTRICT and DOOR COUNTY, it is useful to review the facts and rationale in those decisions in some detail. In DOOR COUNTY, the Commission’s investigator had begun the sometimes extended process of finalizing the parties’ offers for purposes of certifying them to interest arbitration. In the initial part of the process, the union had submitted an offer including certain job posting language that could have been construed to apply to employees who were outside the bargaining unit. The employer sent a letter on October 21, 1991, objecting to “certain items” including the job posting language. The union subsequently submitted a new final offer, dated November 30, 1991, somewhat modifying the job posting language. The Commission’s investigator transmitted the union’s offer to the employer with a cover letter dated December 5, 1991 that invited the employer, if it still objected after reviewing the union’s changes, to “make those objections in the form described in ERC 32.11 ... and be advised that the ERB 32.12 (3) ten-day period . . . will begin to run as of the date of the Commission’s receipt of the County’s objection document. . . .” DOOR COUNTY at 5. On December 16, 1991, the investigator received a letter from the employer, stating “We are again going to object to the posting language” The investigator then sent a letter to both parties “reiterat[ing] my December 5 direction that [the employer] formalize [its] remaining objections. . . .” *Id.* The investigator’s letter suggested a way in which the union was prepared to alter the language if it would obviate the dispute. The employer then sent a letter dated December 20, formally objecting “to the posting language” in the union’s final offer.

On December 27, the employer filed its petition for declaratory ruling regarding the posting language. The Commission held that the employer's original objection, expressed in its letter of October 21, initiated the 10-day filing period. Hence, the petition filed on December 27 was untimely. In addition, the Commission noted that the employer's objections received by the investigator on December 16 and December 21 were broader in scope than the October 21 objection. Although the petition ultimately filed was consistent with the broader objections voiced in December, and despite the fact that the employer had not intended the October 21 objection to comprise its final and official position on non-mandatory subjects of bargaining in the union's proposal, the Commission held that the employer was limited to the specific objections it raised in October. The Commission viewed that document as the official "written objection" within the purview of the regulations.

In SUPERIOR SCHOOL DISTRICT, the Commission's investigator had sent a letter to the parties dated October 24, 2001, stating, inter alia:

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.

By letter dated November 13, 2001, the employer, noting "I have been unable to talk with you regarding issues that we need clarified," informed the investigator that the employer "reserves the right to object to permissive subjects of bargaining in the new contract." On November 30, 2001, the investigator received the employer's final offer along with a list of 13 contract provisions, identified only by Article and Section, labeled "Objections to the Final Offer submitted by" the union. By letter dated December 12, the investigator informed the employer that the union did not intend to amend its final offer and he directed the employer:

to serve upon me its written objections to all allegedly permissive subjects, and its basis therefore [sic], at my office . . . on or before . . . January 2, 2002. . . . The [employer] may, if it prefers, file a petition for a declaratory ruling on these matters with the Commission . . . If the [employer] chooses to file objections, it will have 10 calendar days after the filing of those objections to file a petition for declaratory ruling

On December 31, 2001, the employer filed a document with the investigator stating, inter alia, ". . . please accept this letter as service of the [employer's] written objections to the

permissive subjects, and the basis therefore” This document identified the same 13 contract terms, but followed each item with the employer’s reason for believing the item to be non-mandatory. The employer then filed its Petition for Declaratory Ruling on January 10, 2002. Relying upon DOOR COUNTY, the Commission held that, despite the investigator’s contrary instructions, the “written objection” for purposes of triggering the 10-day filing was the employer’s November 30 document and that the Petition was therefore untimely.

In both DOOR COUNTY and SUPERIOR SCHOOL DISTRICT, then, the employer clearly had had no intention of “jumping to Step (3)” of the process when it filed the document that the Commission later construed to be the “written objections” triggering a 10-day filing period for the Petition itself. Importantly in both cases the Commission’s investigator was equally in the dark about the jurisdictional consequences the Commission would attach to the employer’s initial document.

The facts of the instant case are markedly similar. In all three cases, the employers who raised their initial objections in written form (assuming arguendo that e-mail is a “writing”) apparently lacked any intention or awareness of triggering the 10-day time period for filing a formal petition. In all three cases, the parties were in the process of exchanging a series of final offers, negotiations had not yet ceased, and the employers’ objections seemed designed to elicit a modification of the union’s final offer that might yield a settlement. In none of the three cases had the employer’s initial “written objection” included the reasons or “basis” for the objection, other than the assertion that it was “permissive” or “not mandatory.” Finally, in all three situations the Commission’s investigator, as well as the employer, misapprehended the potentially jurisdictional nature of the employer’s initial informal objection. In each case, the investigator apparently believed it to be his or her duty to issue a directive or at least a notification regarding the requirements of the rules as they pertained to the 10-day filing period.

In essence, then, the Commission’s holdings in SUPERIOR SCHOOL DISTRICT and DOOR COUNTY construed the Commission’s rules as a trap for the unwary, among whom one would have to include the Commission’s own staff. Moreover, it is a trap that cannot be escaped, as it ousts the Commission of jurisdiction to entertain a party’s otherwise properly filed petition for declaratory ruling.

It is axiomatic that procedural rules should be construed to avoid a forfeiture or a trap unless that result is clearly compelled. In our view, the language and purpose of the Commission’s rules do not require so harsh a result. Indeed, we believe a more sensible interpretation of those rules, and one that is more faithful to their language and purpose, is readily available. We note first that the Commission has two rules bearing on this question: ERC 32.11 (1), setting forth the time for raising objections, and ERC 32.12 (3), setting forth the time for filing a petition for declaratory ruling. While these rules relate to each other, they serve two different purposes. The purpose of ERC 32.11 (b), as we see it, is to make sure that

objections are raised at a time and in a manner that facilitates clear notice of the issues and an opportunity for the parties to respond to those issues before bargaining has ceased and final positions have solidified. To this end, the rule does not dictate time frames, but leaves those in the control of the investigator, presumably with an eye to the progress of negotiations and the fluidity of the parties' positions. In regulating in some detail the form of the written objection, the rule requires not only that the objectionable proposal be identified, but "the basis for the claim." We do not see this requirement as superfluous language, but an integral part of the regulatory scheme designed to encourage dialog, debate, response, and ideally a resolution that would negate the need to file a formal petition. We also note that the rule presumes that an "objection" will be followed by a direction from the investigator about the content, manner, and timing of the official written objection. The rule does not say, "If the objection was not in writing," nor, in stating the preliminary condition, "should either party . . . raise an *oral* objection." The rule by its terms seems to state what must happen (the investigator "*shall direct* the objecting party to reduce the objection to writing . . .") if "*an* objection" is "raised."

In contrast to the fluid timing that appropriately marks Rule 32.11 (1)(b), giving discretion to the investigator so as to foster negotiations and settlement, Rule 32.12 (3) sets forth a strict time frame for filing the petition for declaratory ruling if it is filed after the investigator has called for final offers. ". . . within 10 days following the service on the commission or its investigator of *the* written objection. . . ." The strict time frame is followed by a strict result: failure to timely file constitutes a "waiver of the objection." As the Commission noted in SUPERIOR SCHOOL DISTRICT and DOOR COUNTY, this rule is designed to move the process along and limit the potential for manipulation and delay through frivolous objections. Because ERC 32.12 (3) incorporates a waiver and a forfeiture, we think the term "service" as used therein refers to and reinforces the formality of the service requirements described in ERC 32.11 (1)(b), which, if directed by the Commission's investigator as we interpret the rule, cannot have occurred accidentally or without clear notice. Moreover, we note that ERC 32.12 (3) refers to service of "*the*" written objection, not merely "a" written objection. In that sense, too, the rule seems best interpreted to mean one specific triggering event, i.e., the written document that is filed in response to the clear directive of the investigator, as we have interpreted ERC. 32.11.

Our interpretation does establish a mandatory step in the objections procedure, i.e., a directive from the investigator followed by a written objection meeting certain requirements. As the Commission had interpreted these rules in SUPERIOR SCHOOL DISTRICT and DOOR COUNTY, this step could elide with the initial step of "raising" an objection; if the party raised the objection in writing, it automatically triggered the 10-day filing period set forth in ERC 32.12 (3). In contrast, our interpretation in this case may elongate the process, since it requires an action or direction by the Commission investigator. Even if so, it would not

amount to a sufficient countervailing concern when compared with the potential for recurring inadvertent waivers that is inherent in the Commission's previous interpretation. However, we note that a party who is concerned about delay can encourage the investigator or the Commission to act promptly when objections have been raised. Nor do we see this step of formalizing objections as duplicative of the ultimate step in the procedure, i.e., the filing of a petition for declaratory ruling. While a written objection does require a party to invest some time and energy in stating its objections and their grounds and providing copies to the investigator and the other party, it is still less formal and less involved than filing a petition with the Commission itself.

Thus our construction of these two rules promotes the non-delay policies with which the Commission was concerned in SUPERIOR SCHOOL DISTRICT and DOOR COUNTY, encouraging parties to raise only those objections they may seriously intend to pursue and promoting clarity and dialog in those objections that are raised, while still allowing flexibility for investigators in managing the negotiations. Just as importantly, our construction ensures that no party inadvertently waives an objection. In this case, for example, the District's initial e-mail in May 2003 seems an attempt to communicate views and solicit reactions – that is, engage in bargaining – rather than an attempt to initiate formal litigation that may have been premature in the context of these negotiations. We see no need to view that communication differently than its author intended.

In sum, we believe the Commission intended ERC 32.11 (1)(b) to establish an intervening step of intermediate formality, with less rigid timelines and consequences, prior to the filing of a full-fledged petition. We hold that this step was not fulfilled by the District's May 12, 2003 e-mail. Hence we decline to dismiss the petition.

Dated at Madison, Wisconsin, this 4th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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