STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

CITY OF MADISON, a municipal corporation,

Petitioner,

Case #121-135

vs.

DECISION

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

Before Hon. Richard W. Bardwell, Judge.

This is a review under Chapter 227 of an order of the Wisconsin Employment Relations Board (hereinafter referred to as WERB) whereby the board ordered that fact finding be initiated pursuant to Section 111.70 (4)(e), Wis. Stats. The fact finding was ordered with respect to a dispute between Joint School District 8, City of Madison (hereinafter referred to as the school district or school board) and the representative of non-supervisory teachers of such district, Madison Teachers, Inc. (hereinafter referred to as the teachers union or representative).

We have reviewed the record carefully and find there is no material dispute with respect to the facts involved. In our judgment the findings of fact entered by the WERB quite adequately set forth all the pertinent and necessary facts as follows:

> "1. That Madison Teachers, Inc., hereinafter referred to as the Teachers, is a labor organization within the meaning of Section 111.70, Wisconsin Statutes, and has its offices at 411 West Main Street, Madison, Wisconsin.
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> 2. That Joint School District No. 8, City of Madison, et al., hereinafter referred to as the School Board, is a municipal employer within the meaning of Section 111.70, Wisconsin Statutes, and has its offices at 545 West Dayton Street, Madison, Wisconsin.
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> 3. That at all times material herein said Teachers has been, and is, the exclusive collective bargaining representative for the nonsupervisory teachers in the employ of the School Board in an appropriate collective bargaining unit.
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> 4. That prior to March, 1966, Teachers had submitted to the School Board proposals for wages, hours and conditions of employment covering teachers in the employ of the School Board for the school year 1966-1967; that on March 3, 1966 representatives of the School Board and Teachers met in their initial collective bargaining session with reference to the working conditions of teachers for the 1966-1967 school year; that during said meeting the School Board, by its Superintendent, presented to representatives of the Teachers a calendar which the Superintendent indicated he intended to propose to the School Board for its adoption, reflecting the various classroom days, teachers' meetings, convention days, holidays and vacation days, for the school year 1966-1967; that at the time the Superintendent indicated that he did not consider his proposed calendar to be a matter for collective bargaining, and that he was submitting same to the Teachers for their review and reaction, and at that time he invited Teachers to suggest to the School Board changes in the proposed calendar.

"5. That on March 10, 1966, after reviewing the Superintendent's proposed calendar, Teachers prepared and submitted a proposed calendar to the administrative officers of the School Board; that in the afternoon of March 21, 1966, representatives of the Teachers and School Board again met in negotiations; and that at said meeting representatives of the School Board submitted a revised proposed 1966-1967 calendar to representatives of Teachers; that on the evening of March 21, 1966, at a regular School Board meeting, the matter of the 1966-1967 calendar was made a matter of business, in that a motion was presented for the approval of the calendar as prepared and revised by the Superintendent; that representatives of the Teachers were present and were requested by the School Board to comment on the proposed calendar; that thereupon a representative of Teachers requested that the School Board consider the calendar as a negotiable item; that the School Board thereupon set aside further action on the calendar and posponed to a subsequent meeting; that at a subsequent meeting held on March 25, 1966, members of the School Board reached an impasse among themselves with respect to the issue as to whether the matter of the calendar was subject to collective bargaining between the School Board and Teachers; and that thereupon the School Board determined to seek a legal opinion from the City Attorney with respect to the matter.

6. That on April 4, 1966, after having received a legal opinion from the City Attorney, wherein the City Attorney advised that the matter of the school calendar was not a subject matter of collective bargaining, the School Board, without further conferences or negotiations with the Teachers, adopted the school calendar as revised by the Superintendent, with a slight modification.

7. That the School calendar proposed by the Teachers for the year 1966-1967 differed in various aspects from the original and revised calendars prepared by the Superintendent and adopted by the School Board; and that representatives of the Teachers and the School Board have been, and continue to be, deadlocked with respect to the 1966-1967 school calendar after a reasonable period of negotiations."

Based on the above cited findings of fact the WERB entered the following two key conclusions of law which are the subject of this review:

"1. That the issue as to whether the calendar setting forth the school year, teaching days, teachers' meeting days, convention days, holidays, vacation days and the like, is a subject matter of collective bargaining within the meaning of Section 111.70 of the Wisconsin Statutes.

"2. That a deadlock within the meaning of Section 111.70 (4)(e) of the Wisconsin Statutes exists between Madison Teachers, Inc. and Joint School District No. 8, City of Madison, et al. with respect to the 1966-1967 school calendar, affecting teachers in the employ of said Municipal Employer, who are represented by said Labor Organization."

Under date of October 14, 1966, WERB proceeded to order that fact finding be initiated for the purpose of recommending a solution of the dispute between the teachers organization and the school board with respect to the 1966-1967 school calendar. In our judgment there are three principal issues to be resolved by the reviewing court: (1) Is the case moot? (2) Have the requirements which permit fact finding to be initiated under Section 111.70(4)(e) been met? (3) Is the school calendar a proper subject for negotiations under Section 111.70(2), Wis. Stats.?

ISSUE OF MOOTNESS

Essentially, the WERB's order deals only with fact finding relating to the 1966-1967 Madison school calendar. This calendar will have become history by early June which is obviously in advance of any time in which any meaningful fact finding could possibly be accomplished.

There is a general rule that an appeal will be dismissed if the right in controversy has expired by lapse of the time fixed for its continuance. This appears to be the case here. However, there is an exception to such rule where interests of a public character are asserted under conditions which may immediately recur after dismissal of the case in question. Wisconsin E. R. Board vs. Allis Chalmers W. Union, 252 Wis. 436, 441. The foregoing situation clearly obtains here because the matter of the negotiability of the school calendar is a subject which recurs annually.

Actually, the 1967-1968 school calendar was set up by the superintendent of schools and approved for adoption by the board of education at its meeting on March 20, 1967. Whether the 1967-68 school calendar is still subject to furtner negotiations will be one of the matters to be determined by the fact finder, should one be appointed under the statute.

Finally, as stated in Paragraph 6 of the city's petition for review, the question of the negotiability of the school calendar is a matter of paramount public interest. Counsel for the teachers' union agrees with this statement as does counsel for the WERB. We therefore conclude that the case before the court is not moot and that our decision herein will eventually affect all subsequent negotiations between the teachers' union and the school board.

STATUTORY REQUIREMENTS FOR FACT FINDING

Section 111.70 in material part provides as follows:

> "(4) Powers of the Board. The board shall be governed by the following provisions relating to bargaining in municipal employment:
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> * * *
>
> "(e) Fact Finding. Fact finding may be initiated in the following circumstances: 1. If after a reasonable period of negotiation the parties are deadlocked, either party or the parties jointly may initiate fact finding; 2. Where an employer or union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement." (Emphasis supplied.)

It is true that the board in its conclusions of law (Conclusion 2 quoted above) found that a deadlock within the meaning of Section 111.70 (4)(e) had occurred in the negotiations between the teachers' union and the school district. Counsel for the city takes the position that there could not possibly be a deadlock in negotiations when one side (here the school district) refused to negotiate on the issue of the school calendar upon the advice of the city attorney. A careful reading of the findings of fact entered by the WERB, particularly Paragraphs 5 and 6, supports this contention for the school board actually refused to meet and negotiate on the matter of the school calendar. However, it should be pointed out that Section 111.70(4)(e) provides that fact finding may be initiated by either side if the parties are deadlocked in their negotiations or where either side refuses to negotiate in good faith on a negotiable issue.

We have a situation here where the parties began negotiating in good faith but then reached a deadlock on the issue of the negotiability of the school calendar. It may be argued with equal force that the school board flatly refused to negotiate at all on the issue of the school calendar. As a matter of substance we do not think it makes any difference which view one takes. It is apparent, in our judgment, that the requisite condition, either a deadlock or a refusal to negotiate, has been met in the instant situation and that the WERB properly entertained the petition for fact finding. This ruling, of course, assumes that the school calendar is a proper subject for negotiation under the statute.

Certainly counsel for both parties in their oral argument took the position that the question of the negotiability of the school calendar should be determined on this review as it was a matter of such overriding importance.

NEGOTIABILITY OF THE SCHOOL CALENDAR

The controlling statute under which the WERB found the school calendar to be a negotiable matter is Section 111.70(2) which provides as follows:

> "(2) Rights of municipal employes. Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities." (Emphasis supplied.)

The above quoted statute was first adopted by Chapter 509, Laws of 1959. By its terms it requires that there be compulsory collective bargaining between labor organizations representing municipal employees and their municipal employers or their representatives on questions of wages, hours and conditions of employment. As a concomitant duty of the right of municipal employees unions to force collective bargaining on questions of wages, hours and conditions of employment, such employees forfeit all right to strike. Sec. 111.70(4)(l), Wis. Stats. The right to compel collective bargaining on certain specific issues was substituted for the employees' historic right to strike. This is not precisely a "quid pro quo". Rather it is actually the substitution of a lesser for a greater right. Under such circumstances the lesser right, i.e., the right to compel negotiations on issues affecting employment conditions, should be broadly construed to more equitably balance the scales of justice.

In support of its finding that the school calendar is a negotiable issue the WERB, with Chairman Slavney and Commissioner Anderson writing the memorandum opinion, pin-pointed the issue rather succinctly at page 8 of the decision as follows:

> "The school calendar affecting teachers in the employ of the School Board has a direct and intimate relationship to their salaries and working conditions. The calendar establishes the number of days and duties of the school year, the number of and date of active teaching days, the number of dates of teacher meeting days which teachers are required to attend, the number of and dates considered holidays, the number of and dates considered convention days, and the like. It is obvious that if teachers are to be paid by the school year for the total number of days considered to be school days, as affected by holidays and vacations, etc., the calendar has a direct and intimate relationship to the salaries received by the teachers as well as other conditions of their employment."

Section 111.70(2) requires that there shall be negotiations between the teachers' union and the school board on questions of wages, hours and conditions of employment. This is a direct and unequivocal legislative mandate. The WERB found in its decision that the school calendar has a direct and intimate relationship to the salaries and working conditions of the teachers. Our problem in this review is to determine whether or not such finding is supported in the record and under the applicable law.

In its petition for review the city on behalf of the school board sets forth four grounds as to why the decision of the WERB should be reversed. These are:

a. Contrary to petitioner's constitutional rights and privileges.
b. The decision of the respondent should be reversed as being in excess of the statutory authority and jurisdiction of the respondent and is effected by error of law.
c. Totally unsupported by substantial evidence in view of the entire record as submitted and reaching a result based on evidence which a reasonable mind could not accept to support the conclusions.
d. Arbitrary and capricious.

In our judgment contentions a, c and d set forth above are without merit and may be dismissed with very little additional comment. There is nothing in the record to indicate that the board acted arbitrarily or capriciously or that any constitutional rights of the petitioning city have been undermined. Also, as earlier stated, there is no material dispute in the evidence, and it is conceded that the school calendar in many ways impinges on the matter of wages, hours and working conditions of the teachers. In fact, counsel for the city conceded that the fixing of the school calendar does in some ways affect wages, hours and conditions of employment.

It is ground b above, the question of whether the WERB has acted in excess of its statutory authority in holding the school calendar to be negotiable, which presents the only real issue on this review.

The city in its argument seeking to overturn the WERB order bases its position on two principal grounds: (1) Bargaining on the school calendar issue would be an illegal act, i.e., an unauthorized, illegal delegation of responsibility by the school board to a fact finder. (2) The flood gates argument. We will treat each of these grounds in order.

The board of education aruges that under the provisions of Chapter 40 it has the absolute duty and responsibility to determine and set up the school calendar. For example, Section 40.22(12) provides that the school board shall fix the school year length. Section 40.67(1)(c) provides that school must be held at least 180 days per year. The school board also takes the position that determining the school calendar is a matter of educational policy which must be determined by the superintendent of schools in consultation with the school board. The city attorney contends that the calendar is educational subject matter which must be determined by the school authorities without interference by others regardless of their motives.

In our judgment the foregoing argument completely misses the point of the WERB ruling. If the school calendar is a legally negotiable subject under the provisions of Section 111.70, as already determined by the WERB, then obviously the school board is not acting illegally when it merely negotiates on the matter of the school calendar. Particularly will this become crystal clear should both this court and the supreme court sustain the WERB ruling.

Further, on this question of the school board allegedly improperly relingquishing certain of its legislative powers, we point out that any recommendations of a fact finder made under the statute are merely advisory. Neither side is under any legal compulsion whatsoever to accept the conclusions and recommendations of the fact finder. The school board and the superintendent retain control. There is no abdication of responsibility.

Simply put, the fact finding procedure merely gives each side the opportunity to present its position before some neutral person or persons which acts as a fact-finder and makes findings and recommendations for solution of the dispute. No enforcible order may be made as a result of the fact finding process. Consequently, it cannot fairly be maintained that the school board gives up any of its decision-making powers by merely negotiating with its teachers on the school calendar.

In its wisdom the legislature apparently felt that the fact finding procedure prescribed by the statute would, in many cases, turn up facts which could lead to an equitable adjustment of labor disputes. It is difficult for the court to understand why the school authorities are so vehement in their opposition to the underlying purpose of the statute. This fact finding procedure can in no way tie the hands of the superintendent or the board of education, but it can serve to enlighten them in certain areas which are neither black nor white.

The second basic objection of the school board to negotiating on the school calendar is the so-called flood gates argument. The school board reasons that if the teachers' union is permitted to negotiate concerning the school calendar, it will then seek to negotiate on such subjects as the curriculum, textbooks, staffing pattern problems and even who the next superintendent of school might be. Our answer to this premature fear on the part of the school board is that each problem in the field of labor relations must be met but certainly not in advance of its arrival.

In its first conclusion of law the WERB defined the school calendar as that which sets forth "the school year, teaching days, teachers' meeting days, convention days, holidays, vacation days, and the like." These enumerated items, in our judgment, clearly affect wages, hours and conditions of employment as those terms are used in Section 111.70(2). Neither the WERB nor this court is ruling that the determination of a curriculum, the choice of textbooks or the selection of the school superintendent fall within the gambit of wages, hours or conditions of employment. In our judgment they do not, but that issue was not before the WERB and it is not before this court.

Finally, the city attorney in his brief assumes that neither the superintendent of schools nor the board of education can make any mistakes in the school calendar they propose and adopt. This presupposes perfection, a state which, to our knowledge, has not yet been attained where the affairs of humans are concerned. Also the city attorney argues inferentially that teachers really shouldn't organize but should stand aloof in their professional independence. Such a view overlooks reality. Very significant improvements in teachers' salaries and working conditions are of quite recent origin. Many of these improvements were the direct result of bargaining efforts by the teachers' union. This is an economic fact of life.

It should be noted that the States of Connecticut, Michigan and Massacnusetts, which have statutes similar to Section 111.70, have uniformly held that the matter of the school calendar is a proper subject of negotiation between the teachers' unions and their employers. See also Meat Cutters Union v. Jewel Tea Co. (1965), 381 U.S. 676, 14 L. ed. (2d) 640.

In summing up it is our judgment that the rights of municipal employees, particularly the right to negotiate with their municipal employers on questions of wages, hours and conditions of employment, should be given a liberal construction by the WERB which is charged under the law to protect and safeguard these rights. Moreover, we feel that where an impasse results in the bargaining process, recourse should be made to the fact finding procedure prescribed by Section 111.70(4)(e) and (f). Any fair interpretation of Section 111.70(2) compels the finding that the school calendar is a compulsorily negotiable subject to the extent that it affects wages, hours and conditions of employment. That is precisely what the WERB has held in its conclusions of law and decision.

Counsel for the WERB may prepare a form of judgment confirming in all respects the findings of fact, conclusions of law and order here under review. A copy of such proposed judgment should be furnished counsel for the City of Madison and counsel for the intervening Madison Teachers, Inc., before submission to the court for signature.

Dated, April 26, 1967.

RICHARD W. BARDWELL
Circuit Judge