STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

CITY OF BELOIT, a Municipal Corporation, By the BELOIT CITY SCHOOL BOARD, its Agent,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case Nos. 144-272
144-406

JUDGMENT

BELOIT EDUCATION ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 144-472

Decision No. 11831-D

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled three review proceedings having been heard by the Court on the 10th day of March, 1975, at the City-County Building in the City of Madison; and City of Beloit, by the Beloit City School Board, having appeared by Attorney Herbert P. Wiedemann of the law firm of Foley & Lardner and by Attorney George Blakely; and Beloit Education Association, Wisconsin Education Association Council, having appeared by Attorney John C. Carlson of the law firm of Lawton & Cates; and Wisconsin Employment Relations Commission having appeared by Assistant Attorney General Charles D. Hoornstra; and the Court having had the benefit of the argument and briefs of counsel; and the Court having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Decision No. 11831-C of Wisconsin Employment Relations Commission dated September 11, 1974, entered In the Matter of the Petition of City of Beloit, a Municipal Corporation, by the Beloit City School Board, its Agent, Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute between Said Petitioner and Beloit Education Association, is modified so as to strike from Finding of Fact No. 8 thereof "(1) Referral of problem students to specialized personnel and others" appearing under the heading "F. Problem Students", for the reason that the stricken item constitutes a matter of basic educational policy to which Conclusion of Law No. 1 and Declaratory Ruling 1 are applicable, and, as so modified, said Decision is affirmed.

Dated this 31st day of March, 1975.

By the Court:

George R. Currie /s/
Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

CITY OF BELOIT, a Municipal Corporation, By the BELOIT CITY SCHOOL BOARD, its Agent,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case Nos. 144-272
144-406

MEMORANDUM DECISION

BELOIT EDUCATION ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 144-472

Decision No. 11831-D

BEFORE HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled three review proceedings have by order of this Court dated December 6, 1974, been consolidated into one case for purposes of hearing. In cases Nos. 144-272 and 144-406 the petitioner is City of Beloit, by the Beloit City School Board, its Agent (hereafter the School Board) and in case No. 144-472 the petitioner is Beloit Education Association, Wisconsin Education Association Council (hereafter the Association). The respondent in all three actions is the Wisconsin Employment Relations Commission (hereafter WERC). In all three cases the petitioner seeks review of portions of a declaratory ruling made by WERC dated September 11, 1974, in a proceeding initiated by the School Board in which it petitioned WERC for a declaratory ruling pursuant to sec. 111.70(4), Stats., involving a dispute between it and the Association.

As alleged in the petition for declaratory ruling, the School Board and the Association were parties to a collective bargaining agreement having an expiration date of August 24, 1973. They commenced negotiations in February 1973 for a new Agreement to take effect after that date. As set forth in WERC's Finding of Fact No. 3, the parties engaged in these negotiations until at least April 25, 1973, and a difference of opinion arose as to whether certain proposals submitted by the Association were mandatory subjects of collective bargaining under sec. 111.70(4)(b), Stats., of the Municipal Employment Relations Act (MERA). On April 25, 1973 the Board filed its petition for a declaratory ruling with respect to the dispute and specifically with respect to the Board's duty to bargain on the eleven listed subjects stated in Finding of Fact No. 3. These listed subjects were more specifically set forth in proposals which the Association had submitted to the Board for inclusion in the new Agreement, which proposals are set forth verbatim in Finding of Fact No. 3.

WERC's rulings on all of these disputed subjects which are now in controversy will be hereinafter be set forth as the Court considers each.

STATUTE INVOLVED AND ITS INTERPRETATION

The issues the Court is called upon to resolve in these review proceedings involve an interpretation of sec. 111.70(1)(d), Stats., which provides:

> "'Collective bargaining' means the performance of the mutual obligation of a municipal employer . . . and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. . . . The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employes. In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter."

The Wisconsin Supreme Court has repeatedly declared that the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it is entitled to great weight. Libby, McNeill & Libby v. Wisconsin E.R. Comm. (1970), 48 Wis. 2d 272, 280, 179 N.W. 2d 805; Chevrolet Division, G. M. C. v. Industrial Comm. (1966), 31 Wis. 2d 481, 488, 143 N.W. 2d 532; Cook v. Industrial Comm. (1966), 31 Wis. 2d 232, 240, 142 N.W. 2d 827. It is only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it. Wisconsin Southern Gas Co. v. Public Service Comm. (1973), 57 Wis. 2d 643, 652, 205 N.W. 2d 403. Thus the Court in passing on the rulings made by WERC in this controversy deems the standard it should apply is whether each ruling constitutes a rational interpretation of sec. 111.70(1)(d), Stats.

Before proceeding to consider the rulings made by WERC under this standard the Court deems it desirable to make some general observations about the meaning of the statute.

The School Board contends that this statute recognizes three distinct categories: (1) wages, hours and conditions of employment; (2) management and direction of the governmental unit; and (3) the responsibilities of government, i.e., matters of public policy.

The Court is in disagreement that the third listed category, which is obviously grounded on the last sentence of the statute, constitutes a separate category standing on the same footing as the other two listed categories. As the Court reads the statute the last sentence of the statute lays down general principles to be kept in mind in applying the preceding sentence in determining what are mandatory subjects of collective bargaining in the field of public employment in the state. It is to be noted that the Board in stating its third category omits the important qualification that the public employer's exercise of the responsibilities of government vested in it are subject to the rights secured its employees by the federal and state constitutions "and by this subchapter".

Whether a subject falls in the category of management and direction of the governmental unit, here a school district, or one of wages, hours, or conditions of employment, requires striking a proper balance. These categories are not neat and separate because of the complex interrelationship between them.

The School Board in its brief advances the same contention it did before WERC that according to sec. 111.70(1)(d), if a subject is something other than wages, hours and conditions of employment, it is reserved to the employer and only the effects of the employer's decisions upon wages, hours and conditions of employment are mandatory bargaining items. In answer to that contention WERC in its memorandum accompanying its declaratory ruling stated:

"It is apparent from the plain reading of Section 111.70(1)(d) that the Commission must attempt to harmonize the existing school statutes and the provisions of MERA, and also to recognize that certain matters are reserved to management. However, Section 111.70(1)(d) sets forth the obligation of municipal employers, and in this matter, school districts and their agents, to negotiate with their employes on wages, hours and conditions of employment, and further that municipal employers in exercising their powers and responsibilities must do so 'subject to those rights secured to public employes . . . by this subchapter.' (P. 17)

* * *

"To accept the School Board's argument, that all the duties and responsibilities delegated to, and required of, school districts and their agents are not subject to mandatory collective bargaining, would emasculate the provisions of MERA as applied to employes of a school district, rather than harmonize MERA with the school statutes. We hold that matters, not concerning basic educational policy, which primarily affect wages, hours and conditions of employment, are subject to mandatory bargaining. We further hold that matters, which do concern basic educational policy, but by their impact secondarily affect wages, hours and conditions of employment, are subject to mandatory bargaining as to said impact. Such a conclusion effectuates the principle of statutory harmonization." (P. 18) (Emphasis supplied.)

The Court is in disagreement with the argument advanced by the School Board that WERC has by proclamation amended the statute by drawing the distinction between matters which concern basic educational policy and those which do not, and making the latter the subject of mandatory collective bargaining if they primarily affect wages, hours and conditions of employment. It is the view of the Court that a rational basis exists for WERC's interpretation. The error in the interpretation urged by the School Board is that it does not recognize that there are any limitations imposed by other portions of sec. 111.70(1)(d) upon the words "subjects reserved to management and direction of the governmental unit." Such imposed limitations consist of the provision that requires the municipal employer to collectively bargain with respect to wages, hours and conditions of employment and that such employer is to exercise its powers and responsibilities "subject to those rights secured to public employes . . . by this subchapter."

It is a completely rational approach to hold that a subject, which embodies some function of management that does not concern basic educational policy but primarily affects wages, hours and conditions of employment, does not fall in the category of "subjects reserved to management and direction of the governmental unit" but rather in that of "wages, hours and conditions of employment" with respect to which the School Board must collectively bargain. Therefore, the Court perceives no error of law in WERC's Conclusions of Law which embrace this approach.

This problem of statutory interpretation with which WERC was faced is not unlike in principle to that with which the Supreme Court dealt in Muench v. Public Service Comm. (1952), 261 Wis. 492, 53 N.W. 2d 514, 55 N.W. 2d 40. The question was the interpretation of the word "local" in sec. 22, Art. IV, of the Wisconsin Constitution which authorizes the legislature to confer upon county boards of supervisors powers of a "local, legislative and administrative character". The problem was how to deal with a subject that would affect the people of a county but was also of concern to the people of the state as a whole. The Supreme Court adopted the construction of the word "local" as "including only those matters which primarily affect the people of the locality" (emphasis supplied) (p. 515f).

MATTERS WHICH WERC RULED WERE THE MANDATORY SUBJECT OF COLLECTIVE BARGAINING

The Court will consider seriatim the various matters with respect to which WERC ruled the School Board was required to collectively bargain with the Association to which the School Board has taken exception.

"(a) Teacher Supervision and Evaluation

WERC rejected a portion of the Association's proposals on the subject of teacher supervision and evaluation as not being mandatory subjects of collective bargaining. However, it ruled these five matters were:

(1) Orientation of new teachers as to evaluative procedures and techniques,

(2) Length of observation period and openness of observation,

(3) Number and frequency of observations,

(4) Copies of observation reports and conferences regarding same, and teachers' objections to evaluations, and

(5) Notification of complaints made by parents, students and others.

As the Attorney General's brief points out these matters go to the reasonable expectation of teachers to notice of what is expected of them to be able to attain some security, to have notice of the deficiencies which may threaten that security, and the right to have input into the procedures such as the timing and length of observation which might impair that security. No inherently managerial prerogative such as the selection of evaluators is touched.

It is the Court's opinion that WERC could reasonably conclude the above listed five matters primarily relate to wages and conditions of employment and are not concerned with basic educational policy.

(b) Teacher Files and Records

The Association proposed that all complaints against teachers be written, called to the teacher's attention, and review given to a teacher's answer. Only complaints which "may have an effect on [a teacher's] evaluation or his continued employment" are covered. See Finding of Fact #4, F., p. 4. In addition, the Association proposed that a teacher could review his file; that obsolete or otherwise inappropriate matters be deleted; that a teacher have notice of derogatory matter included in his file and an opportunity to include a written answer. See Findings of Fact #4, G., p. 4.

WERC found these proposals primarily to relate to wages, hours, and conditions of employment. See Finding of Fact #8, B., and its amendment of October 17, 1974. Its rationale incorporated the rationale as to teacher supervision and evaluation, and added (Memorandum, p. 20):

> ". . . These proposals . . . relate directly to the teacher's ability to respond to 'threats' to continued employment."

The School Board's brief makes this attack upon WERC's ruling:

> "Limitations as to the form of the complaints and their availability to teachers would inhibit the community in reacting to the education being provided for it. The School Board has a legitimate interest and perhaps even an absolute responsibility to keep open all lines of communication and to encourage frank and candid expressions of opinion among those it serves. . . .
>
> "Limitations as to the scope and contents of files and mandatory teacher access thereto would intrude drastically upon the relationship between the School Board and its administrators. . . ."

It should be noted that the Association's proposal would not prohibit the School

The purpose of keeping teacher files is for the purpose of evaluating teachers and may well effect their continued employment.

The Court determines that WERC's ruling with respect to teacher files and records not being concerned with basic educational policy but primarily affecting wages, hours and conditions of employment, rests on a rational basis.

(c) "Just Cause" as a Standard to be Applied With Respect to Removal of Teacher Contracts

The School Board does not question the ruling that "just cause" for dismissal or various forms of discipline is a mandatory subject of collective bargaining. It does most strenuously attack the ruling that the Association's proposal, which would make "just cause" a required standard for non-renewal of teacher contracts a mandatory subject of collective bargaining. It contends that since sec. 118.22, Stats., requires boards of education by majority vote to annually decide whether to renew a teacher's contract, the legislature intended that the board's discretion not be delegated to the collective bargaining process.

The Supreme Court in Muskego-Norway C.S.J.S.D. No. 9 v. WERB (1967), 35 Wis. 2d 540, 557, 151 N.W. 2d 617, emphasized that the power of school boards to refuse to renew teacher contracts is not absolute and that one of the restrictions on such power is sec. 111.70(3)(a), enacted in 1959 which prohibits municipal employers, including school districts, from interfering with employee rights. Therefore, deciding the issue with respect to whether non-renewal of teacher contracts except for cause is a mandatory subject of collective bargaining turns on whether sec. 111.70(1)(d) is a further restriction on the power of school boards not to renew teacher contracts.

The School Board's brief cites in support of its position the following extract from the decision in Adamczyk v. Caledonia (1971), 52 Wis. 2d 270, 275, 190 N.W. 2d 270:

> " 'Unless authorized by statute or charter, a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers.' "

The point of the above-quoted holding is that a municipality cannot delegate authority which the legislature has delegated to it "unless authorized by statute or charter." The date of the Adamczyk decision was October 5, 1971. Approximately one month later, the comprehensive revision of s. 111.70, Wis. Stats., including the duty to bargain on wages, hours and working conditions was enacted. Ch. 124, Sec. 2, Laws of 1971, became effective on November 11, 1971. This law, creating the duty to bargain, is the "statute" which was lacking when Adamczyk was decided, which authorizes municipalities to bargain on the subjects enumerated therein. See, Richards v. Board of Education, decision on rehearing, (1973), 58 Wis. 2d 444, 460a-461a, 206 N.W. 2d 597.

The School Board contends that sec. 118.22, Stats., expresses a public policy that there shall be no tenure for teachers outside of Milwaukee County, and that this statute prevails over any conflicting provision in sec. 111.70, Stats. The Board is correct that sec. 118.22 prevails over sec. 111.70 to the extent of irreconcilable conflict. Board of Education v. WERC (1971), 52 Wis. 2d 625, 640, 191 N.W. 2d 242. However, these two sections rationally can be construed so as to harmonize, thus avoiding any irreconcilable conflict.

Section 118.22(2), Stats., provides:

> "(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing

school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. . . ."

Section 118.22(2) states the dates for giving notice of nonrenewal and the date when the teacher must accept an offer of renewal. Absent notice of nonrenewal, the contract renews itself. The self-renewal term indicates a purpose that a teacher have sufficient notice to seek other employment. Nothing provides that the basis for nonrenewal is beyond the scope of collective bargaining. As stated in Oostburg Joint School District 14 v. WERC (Sheboygan Circuit Court, 1974), 74 CCH Lab. Case par. 53, 384, p. 70,373:

". . . the two statutes do not conflict. Sec. 118.22, Wis. Stats., gives the minimum procedures for notice and hearing required by the legislature before a school board can decide not to rehire a teacher. This statute was enacted to safeguard a teacher's interest in continued employment. Sec. 111.70, Wis. Stats., gives teachers and other municipal employes the right to collectively bargain in areas that pertain to wages, hours and conditions of employment. It appears that the rationale behind both these statutes is a legislative desire to provide teachers and municipal employees with procedures and organizations that will enable them to look after their interests."

There being no conflict, the only effect of sec. 118.22 (2) is that no labor agreement can alter the dates on which notice of nonrenewal is to be given, or any of its other terms.

The School Board further contends that the 1971 legislature manifested its intention that sec. 111.70, Stats., should not affect the continuing validity of sec. 118.22 by what it stated in sec. 111.70(3)4 which reads:

". . . Such refusal [to bargain] shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement." (Emphasis supplied.)

It is urged that under the canon of statutory interpretation expressio unius exclusio alterius by enacting the above-quoted statute the legislature made it clear it did not intend to affect a school board's absolute power respecting nonrenewal of teachers' contracts provided in sec. 118.22. The Court is in agreement with the position asserted by the Attorney General that a more reasonable inference is that the legislature sought to block a possible school board argument that it had no duty to bargain with the majority collective bargaining representative since sec. 118.22 requires it to make individual contracts.

Another argument advanced by the School Board is that the 1973 legislature rejected statewide tenure for teachers when it rejected Bill 409, A. This bill failed of passage by reason of adoption of Assembly Joint Resolution 13, a calendar clearing device. Thus, no negative inference of legislative intent can be drawn.

". . . The most that can be said . . . is that the majority of the legislators did not consider it a priority bill." State ex rel. Fitas v. Milwaukee County (1974), 65 Wis. 2d 130, 135, 221 N.W. 2d 902.

It is the Court's conclusion there is no express or implied statutory restriction against nonrenewal of teacher contracts being a subject of mandatory collective bargaining unless such restriction arises by reason of wording contained in sec. 111.70(1)(d). If dismissals are a proper subject of mandatory collective bargaining, which the School Board concedes, it necessarily would seem to follow that nonrenewal of contracts also is.A rational basis exists for WERC ruling that both primarily concern wages, hours and conditions of employment rather than any basic educational policy.

(d) Teacher Layoffs

The Association's proposal on layoffs (Finding of Fact No. 4, p. 5) reads:

> ". . . If necessary to decrease the number of teachers by reason of a substantial decrease of pupil population . . . [the employer] may lay off the necessary number of teachers, but only in the inverse order of the appointment of such teachers. . . ."

WERC found this proposal primarily to relate to wages, hours and conditions of employment. Finding of Fact No. 8, E. Its rationale is that the proposal goes to being employed or unemployed. See Memorandum, p. 21. WERC was careful to limit its rulings to the specific proposals made by the Association.

Seniority is one of the most fundamental and important rights of working people. In Clark v. Hein-Werner Corp. (1959), 8 Wis. 2d 264, 273-274, 99 N.W. 2d 132, the Court noted that seniority rights which "were created solely by reason of the labor contract . . . constitute a valuable property right and cannot be divested without due process of law." It has been said that "since seniority is so obviously a condition of employment--and is a condition commonly existing under union contracts, litigation questioning its mandatory status has been minimal." The Developing Labor Law, Sec. of Lab. Rel. Law, ABA, p. 406.

The School Board asserts that educational policy is implicated when layoffs become necessary because of decrease in pupil population as to: (1) what programs will be reduced, and (2) what staff qualifications are needed.

However, as pointed out in the Attorney General's brief, nothing in the Association's proposal governs the programs to be deleted or reduced. Further, nothing suggests a more senior Fourth Grade athletic teacher must displace a less senior Twelfth Grade physics teacher. The Court deems that it would be an implied condition in the proposal as worded that such an absurd result was not required. Section 111.70(1)(d) would require a reasonable clarification to that effect be inserted in the collective bargaining agreement if proposed by the School Board. As so clarified the proposal is one which WERC could reasonably determine involved no basic educational policy and is primarily concerned with wages, hours and conditions of employment.

(e) Problem Students

The Association's extensive proposals with respect to problem students are set forth in Finding of Fact No. 4, pp. 5-6. The subjects of such proposals which WERC ruled were mandatorily bargainable (Finding of Fact No. 8, pp. 9-10) are:

> "(1) Referral of problem students to specialized personnel and others,
>
> (2) Relief of teacher responsibility with respect to problem students,
>
> (3) Consent of teacher to whom problem student is assigned,
>
> (4) Exclusion of problem student from classroom, report thereof, and consultation prior to return to classroom,
>
> (5) Teacher self-protection and report of action taken, and
>
> (6) Liability insurance coverage and compensation resulting in absence from duty from injuries in performance of teaching and related duties, with no deduction from accumulated sick leave."

A footnote was made with respect to "Problem Students" in Finding of Fact No. 8 which

"The behavior of students in a classroom, particularly to the extent that it presents a physical threat to the teacher's safety, is a condition of employment. Thus, proposals that go to such matters are mandatory subjects of bargaining. The instant proposal, unfortunately, is ambiguous as to whether it covers only such misbehavior; and the record herein does not clarify such ambiguity. Misbehavior of students that does not involve threats to physical safety is not a condition of employment and therefore, is a permissive subject of bargaining. Thus, for example, determining the appropriate response to students who are disruptive but not physically threatening, because they suffer a physical handicap, is a basic educational policy."

The argument advanced in the School Board's brief does not acknowledge the strict limitation WERC placed on its ruling holding portions of the Association's proposals to be subjects of mandatory bargaining so as to confine the same strictly to student misbehavior involving physical threats to the teacher's safety. The School Board's argument is directed to the principle that how to deal with a problem child so that he will not be ostracized and lack proper education is a matter of educational policy.

As so limited, the Court is in agreement with the WERC that subject matters (2), (3), (4), (5) and (6) listed under "Problem Students" in Finding of Fact No. 8 are mandatory subjects of collective bargaining because they relate to conditions of employment and not basic education policy. However, neither WERC's Memorandum nor the briefs submitted by the Attorney General and the Association present any justification for including subject matter (1), referral of problem students to specialized personnel and others, in this category.

The Association's proposal with respect to subject matter (1) reads:

". . . Whenever it appears that a particular pupil requires the attention of special counselors, special teachers, social workers, law enforcement personnel, physicians or other professional persons, such students shall be referred to that particular person."

The Court is of the opinion that this proposal involves a matter that falls primarily in the field of basic educational policy and therefore is not a subject of mandatory collective bargaining.

(f) In-Service Training

The Association presented a comprehensive proposal for in-service training of teachers which is set forth in Finding of Fact No. 4, page 6. Much of this proposal was not included by WERC in what was ruled to be a subject of mandatory bargaining. The reason for this exclusion was stated in the Memorandum (p. 22) as follows:

". . . However, we conclude that the type of programs to be held on such days, and the participants therein are not subjects of mandatory bargaining, since we are satisfied that such programs and the participants thereof have only a minor impact on working conditions, as compared to the impact on educational policy."

The only part of the proposal ruled mandatorily bargainable is set forth in Finding of Fact No. 8, G., page 10, and is limited to "The number of in-service days during the school year, and the day of the week such days will fall."

This ruling is limited to a matter of calendaring and the Court's holding with respect to the school calendar being a mandatory subject of bargaining is equally applicable to the in-service training ruling.

(g) The School Calendar

WERC ruled that "all aspects of the school calendar" were mandatorily bargainable. See Finding of Fact No. 8, H, page 10.

The School Board contends this ruling constitutes an unconstitutional delegation or surrender of its legislative discretion, and cites Joint School District No. 8 v. WERB (1967), 37 Wis. 2d 483, 494, 155 N.W. 2d 78, wherein the Supreme Court declared:

> ". . . If the school calendar was subject to collective bargaining in the conventional sense in which that term is used in industrial labor relations under sec. 111.02(5), there would be merit to the argument of the school board that its legislative function is being delegated or surrendered and thus the calendar could not constitutionally be a subject of negotiation although it fell within the broad terms of the statute."

While the Supreme Court stated there would be merit to the constitutional argument which was the subject of the above-quoted comment, it did not go so far as to state that making calendaring the subject of collective bargaining would be unconstitutional. Furthermore, the Supreme Court also stated on the same page of its decision on which appears the above-quoted extract (p. 494):

> ". . . We think if the ultimate responsibility for decision is solely that of the school board, the legislative authority is not limited or delegated."

Here, it can be plausibly argued the ultimate responsibility for decision rests with employer.

> ". . . The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession." Sec. 111.70(1)(d), Stats.

Nevertheless, the Court must concede that Joint School District No. 8 v. WERB, supra, seems to intimate that having to negotiate the calendar through collective bargaining places a restriction on the Board's legislative authority with respect to calendaring because of this further statement in the decision (p. 494):

> ". . . However, under sec. 111.70 the school board need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective-bargaining sense."

The statement about coming to an agreement in the collective bargaining sense is not to be interpreted as meaning that the school board is required to reach an agreement. The Supreme Court was fully cognizant that all that is required of the employer in collective bargaining is to bargain in good faith with respect to proposals submitted by the collective bargaining agent of the employees. An agreement with respect to a particular proposal is not required.

Because no agreement is required by a school board to proposals submitted by the bargaining representative of the teachers, sec. 1, Art. X, of the state Constitution does not in the opinion of this Court impose any limitation on what subject matters of school administration the legislature is authorized to make subject to the requirement of collective bargaining. This section of the Constitution provides that the supervision of public instruction "shall be vested in a state superintendent and such other officers as the legislature shall direct." Thus whether the school calendar is properly a subject of mandatory collective bargaining is a matter of statutory interpretation.

WERC in its Memorandum at page 22 stated:

> "We conclude that the school calendar is a mandatory subject of bargaining, since it establishes the number of teaching days, in-service days, vacation periods convention dates, and the length of the school year directly affecting 'hours and conditions of employment.'"

The Supreme Court in Board of Education v. WERC (1971), 52 Wis. 2d 625, 633-634, 191 N.W. 2d 242, stated:

". . . The school calendar and in-service days are subject to negotiation with the bargaining agent under sec. 111.70(2), Stats. Likewise educational conventions, and whether they are to be considered in-service or school days, and questions of compensation for such days are, we believe, within the statutorily defined area of negotiations on 'wages, hours and conditions of employment.'" (Citing Joint School District No. 8 v. WERB, supra.)

The Court is satisfied that a rational basis exists for WERC interpreting sec. 111.70(1)(d), Stats., as requiring that the school calendar is a subject of mandatory collective bargaining.

MATTERS WHICH WERC RULED WERE NOT THE MANDATORY SUBJECT OF COLLECTIVE BARGAINING

Under this heading the Court will only consider those matters which WERC ruled were the subject of permissive, and not mandatory, collective bargaining that the Association contends are required to be mandatory subjects by sec. 111.70(1)(d), Stats.

(a) Training for Teachers Having Professional Problems

In the Association's proposals with respect to Teacher Supervision and Evaluation it included proposals for training assistance to teachers having professional problems and the techniques to be employed in providing such training. See Finding of Fact No. 4, paragraphs E 1 and 2, pages 3 and 4. WERC by Finding of Fact No. 6, page 8, found that these proposals for "Assistance to teachers having professional difficulties or any techniques relating to such assistance" relate "to the management of the instant school district and to the supervision of teaching personnel in its employ and do not significantly involve wages, hours and working conditions of the teachers."

WERC in its Memorandum explained its reason for this finding of fact as follows (p. 20):

". . . the proposals involving . . . assistance to teachers having professional difficulties, and the techniques to be employed in dealing with teachers found to be suffering professional difficulties, reflect efforts to determine management techniques rather than 'conditions of employment.' As such, they are not subjects of mandatory bargaining."

The principal ground of attack leveled by the Association against the ruling made that these training proposals were not the subject of mandatory collective bargaining is that that Finding of Fact No. 6 is grounded on printed educational reports and articles (Exhibits 3-14) that were improperly admitted into evidence over objection.

The Association contends these articles and reports are hearsay which were not authenticated by the necessary foundation being laid as required by Lewandowski v. Preferred Risk Mut. Ins. Co. (1966), 33 Wis. 2d 69, 76, 146 N.W. 2d 505, under the learned treatise exception. However, sec. 227.10(1), Stats., provides:

"Agencies shall not be bound by common law or statutory rules of evidence. They shall allow testimony having reasonable probative value. . . ."

The Association's brief cites Erickson v. ILHR Department (1970), 49 Wis. 2d 492, 181 N.W. 2d 495, and Wisconsin Telephone Co. v. Industrial Comm. (1953), 263 Wis. 380, 57 N.W. 2d 234. However, both of those cases involved hearings in workmen's compensation proceedings which are not covered by sec. 227.10, Stats. The one Wisconsin case which has referred to sec. 227.10 in connection with a hearsay problem is Outagamie County v. Brooklyn (1962), 18 Wis. 2d 303, 118 N.W. 2d 201. In footnote 3, page 312, the Supreme Court stated:

"This court has never passed on the extent, if any, to which administrative agencies may ground decisions upon hearsay evidence in light of the provisions of sec. 227.10(1), Stats."

The Supreme Court in Outagamie County v. Brooklyn limited its holding to the following (p. 312):

"Without deciding under what circumstances hearsay evidence may be admissible before an administrative agency, we hold that it should not be received over objection where direct testimony to the same facts is obtainable."

This Court is of the opinion that under sec. 227.10(1), Stats., it should rest in the sound discretion of an administrative agency whether articles and reports of the nature of Exhibits 3 through 14 should be admissible without foundation testimony being provided as laid down in the Lewandowski case. The Court finds no error in the admission of these exhibits. Furthermore, under sec. 227.20(1), Stats., the Court can only reverse for error which has prejudiced the substantial rights of the complaining party. The Association's brief has failed to point out a single passage in any of the articles and reports which it contends prejudiced its rights with respect to the particular finding here under consideration. Under such circumstances the Court does not deem it to be its duty to plough through this mass of material to find some passage upon which WERC may possibly have grounded its finding. These articles and reports were not offered as being confined to this particular issue but were pertinent to a number of subject matters.

The test of whether a finding is supported by substantial evidence is whether the evidence supporting the finding is such that a reasonable man could accept the same to support the conclusion made. Robertson Transport Co. v. Public Serv. Comm. (1968), 39 Wis. 2d 653, 658, 159 N.W. 2d 636. The Court is of the opinion that under this test the questioned finding needs no evidentiary facts to support it other than the wording of the Association's proposal to which this finding relates.

The Court further determines the ruling made by WERC, that the providing of training to teachers having professional problems is not a mandatory subject of collective bargaining, is a rational one supported by the finding of fact made and the reasons therefor set forth in the Memorandum.

Class Size

Under the heading "Class Size" the Association submitted the following proposal (Findings of Fact No. 4, p. 6):

"Because the pupil-teacher ratio is an important aspect of an effective educational program, the Board agrees that class size should be lowered wherever possible to meet the optimum standards of one (1) to twenty-five (25). Exceptions may be allowed in traditional large group instruction or experimental classes where the Association has agreed in writing to exceed this standard."

WERC, by Finding of Fact No. 7, found that this proposal as to class size related to basic educational policy but that the implementation thereof also had an impact on wages, hours and working conditions. Its declaratory ruling was that class size is not a mandatory subject of collective bargaining, but a duty existed to bargain collectively with respect to the impact thereof on wages, hours and conditions of employment.

WERC is not required to resolve conflicts among educators on educational policy. It could rationally conclude that a school board's prerogatives in making educational policy include the power to decide that class size does affect the quality of education and to set class sizes accordingly.

It is true that the larger the class size the more work is imposed upon the teacher. Therefore, WERC properly held that the impact of class size was a subject of mandatory collective bargaining.

The Judgment to be Entered

The Court has determined that in all respects but one WERC's findings of fact, conclusions of law and declaratory rulings are to be affirmed. The one exception is with respect to the finding made in Finding of Fact No. 8 which classified the item of "Referral of problem students to specialized personnel and others" under the subject of Problem Students as being one which is primarily related to wages, hours and working conditions. The judgment to be entered should provide for the modification of WERC's decision so as to strike from Finding of Fact No. 8 "(1) Referral of problem students to specialized personnel and others", under the heading "F. Problem Students", for the reason that the stricken item constitutes a matter of basic educational policy to which Conclusion of Law No. 1 and Declaratory Ruling 1 are applicable, and for affirmance of the decision as so modified.

Let judgment be entered accordingly.

Dated this 31st day of March, 1975.

By the Court:

George R. Currie /s/
Reserve Circuit Judge