STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, Petitioner,	#144-464
vs.	MEMORANDUM DECISION
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	Decision No. 12055-B

Unified School District No. 1 of Racine County (School Board) has petitioned for judicial review of a Decision and Order of the Wisconsin Employment Relations Commission (Commission).

The facts out of which this dispute arose have been set out in detail in the Findings of Fact made by the Commission. Briefly, they are as follows: The Board has maintained a collective bargaining relationship for almost thirty years with Local 152, Service Employees Union, which represents, among others, school food service personnel. On July 18, 1973, the Board's Finance Committee recommended acceptance of a proposal by ARA Services, Inc. (ARA) to take over management of the food service program for the district's schools.[1] The Committee recommended that the Board's agreement with ARA provide protection for Board food service employees in the areas of job security, wages, and seniority. The union demanded that the Board bargain with the union over any decision to contract out the food service. The Board refused, and the union filed a complaint with the Commission, alleging that the Board's refusal to bargain the food service decision was a violation of the provisions of the Municipal Employment Relations Act, Wis. Stats. 111.70 et seq. On August 16, 1974, the Board entered into an agreement with ARA. The substance of that agreement was set out in the Commission's Finding of Fact #17:

> ". . . according to this agreement. . .ARA assumed the responsibilities of operating the food service program, including employing all personnel necessary to such services, managing all menu considerations, participating in determinations regarding the purchase by the Respondent of capital equipment necessary to the aforementioned expansion of the service, purchasing certain supplies and food required by the operation, and the collection of money from students; that said contract and arrangement, at least at its inception, was contemplated by Respondent as resulting in substantially the same food service program as it had operated, except that it would be operated by ARA and its personnel rather than Respondent Board and its personnel. . . ."

On October 17, 1974, the Commission found that the Board's refusal to bargain the decision to enter the above agreement was an unfair labor practice under the statute and ordered the Board to: (a) bargain with the union relative to the decision and effects of contracting out; (b) maintain the food service program in its form prior to the contract with ARA; (c) reinstate employees to their former positions or their substantial equivalent; (d) make the employees whole for any losses; and (e) post a conspicuous notice saying, in effect, that the employer would comply with the Commission's remedial order.

The question posed to this court is whether the Commission erred in concluding that the Board's refusal to bargain was an unfair labor practice under Wis. Stats. 111.70 et seq. (Municipal Employment Relations Act).

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[1] The committee's recommendation to contract with ARA was the result of a number of factors, among them the desire to expand the then-existing hot lunch program.

I. Standard of Review

The Commission is charged with the application of Wis. Stats. 111.70 et seq. The construction and interpretation of a statute by the administrative agency charged with its application is entitled to great weight. Libby, McNeill and Libby v. Wisconsin E.R. Comm., 48 Wis. 2d 272, 280 (1972). The Commission's decision here should be upheld unless petitioner shows it to be (a) without reason or (b) inconsistent with the purposes of the statute. In Milwaukee v. Wisconsin E.R. Comm., 43 Wis. 2d 596 (1969), the court said:

> ". . . While we agree that the city's argument leads to a reasonable application of the statute, the WERC's determination is neither without reason nor inconsistent with the purposes of the statute. Since that is the ultimate test, the circuit court's decision affirming the determination of the WERC will be affirmed." (at 602.)

We agree with the Board that the particular factual question raised here--whether the contracting-out of a food service program by a school board is a subject of mandatory bargaining--is one of first impression for the Commission. But the Commission has dealt before with analogous fact situations in related areas. Libby, supra. In applying labor-related statutes, it is often called on to apply the principles derived from the resolution of analogous disputes to new fact situations. To withhold the judicial deference traditionally accorded administrative expertise solely because this particular set of facts have not heretofore been passed on by the Commission would dilute the deference doctrine to the point of meaninglessness.

II. Merits

Wis. Stats. 111.70(1)(d), with which we are primarily concerned here, reads:

> "'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." (Emphasis added.)

The statute creates a distinction between a public employer's decisions which relate primarily to "wages, hours and conditions of employment" and decisions "reserved to management and direction of the governmental unit." The employer is required to negotiate the former, but not the latter. The Board contends here that the Commission erred in determining that the decision to contract out the food service program with ARA was not a decision "reserved to management and direction of the governmental unit."

After careful consideration, this court has concluded that the Commission's decision is not without reason nor beyond the purposes of the statute. That conclusion can be reached by either of two routes, each of which is discussed in turn below.

A. The "basic educational policy" test

The first way in which we can assess the Commission's decision is to apply the test adopted by the Wisconsin Supreme Court specifically for disputes between school boards and their employees. If the decision of a school board relates primarily to "basic educational policy," rather than wages, hours, and working conditions, it need not be bargained; if the decision is not within the area of "basic educational policy," it must be bargained. School Dist. #8 v. WERC, 37 Wis. 2d 483 (1967).

Among the subjects which have been expressly or impliedly construed as outside the protected area of "basic educational policy" are (1) school calendar (Joint School Dist. #8, supra); (2) certain aspects of teacher supervision and evaluation (City of Beloit v. WERC, Dane Cir. Ct. Nos. 144-272, 406, 472); and (3) certain aspects of the disposition of problem students (City of Beloit, supra).

In determining whether a subject primarily relates to "educational policy" or to wages, hours and working conditions," we must determine what relative impact the subject has in each of those areas. School Dist. #8, supra, City of Beloit, supra. Applying that test to this case, there is nothing here to indicate that a school district's food service program bears any significant relationship to the quality of education offered in the district. Certainly, it is not as important to the quality of an educational program as a school calendar or the evaluation of teachers. Yet those subjects have been held to be outside the area of "basic educational policy," supra.

On the other hand, a decision to subcontract a food service program has obvious and significant effects on the wages, hours and working conditions of school food service employees.

Therefore, applying the "basic educational policy" test, we find a substantial rational basis for the commission's conclusion that a school board's decision to contract out food service is a subject of mandatory bargaining under Wis. Stats. 111.70 et seq.

B. Private labor analogy

The second means by which one can reach the conclusion reached by the Commission here is through application of certain principles developed to resolve analogous labor disputes.

In Libby, supra, the Wisconsin Supreme Court was called on to construe the mandatory bargaining requirements of the Employment Peace Act, Wis. Stats. 111.02(5) and 111.06(1)(d). That Act has been construed as exempting certain private employer management decisions from bargaining requirements, much as Wis. Stats. 111.70(1)(d) exempts certain public employer decisions from the bargaining requirements of that statute. The protected private employer decisions are those "at the core of entrepreneurial control" involving a "change in the direction of the corporate enterprise . . .a change in capital investment" (Libby at 283).

The Libby court held that a private employer's decision to mechanize part of its harvesting operation involved a change in capital investment which altered the basic direction of the enterprise and was therefore not required to be bargained.

It is clear from the opinion in Libby that, if the employer had "contracted out" the work so that the company's harvester employees had been replaced by the employees of another company, rather than by mechanical harvesters, the decision to "contract out" would have had to be bargained. Justice Robert Hansen so construed the majority decision:

> ". . .the majority of our court makes a distinction between the replacement of a worker by another person and his replacement by a machine." (Dissenting Opinion, at p. 289.)

The Libby court used the fact that the employer in that case replaced workers with mechanized harvesters, rather than with other workers, to distinguish the case from Fibreboard Corp. v. Labor Board, 379 U.S. 203, 85 S. Ct. 398, 13 L.Ed. 2d 233 (1964). In Fibreboard, the court found that an employer's decision to contract out work previously performed by its own employees was not a decision within the protected area of entrepreneurial control and was required to be bargained.

"The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage his business." (at 213.)

A similar conclusion was reached by the National Labor Relations Board in Hospice of Alverne, 195 NLRB No. 60, 79 LRRM 1394, 1972 CCH NLRB par. 23, 877 (1972), in which a nonprofit employer running a home for the elderly subcontracted its food service operation without bargaining with the union.

". . .Employer. . .asserts that this was for economic reasons. . . . The law is well settled that when an employer unilaterally subcontracts unit work as was done here--even for wholly economic reasons--he breaches his duty to bargain about the decision to subcontract and the consequent effect of that decision on the unit employees." (79 LRRM at 1395.)

In our case, the Commission found that the Board, in contracting out its food service, attempted to "implement a change in its operations which 'merely substitutes outsiders doing the same work in the same manner,' as distinguished from a rearrangement that may be said to have 'changed the basic direction of the (employer's) activities.'" Therefore, the Commission concluded that the decision to contract out the food services operation should have been bargained. In light of the principles set forth by Libby, Fibreboard and Hospice, we find that conclusion to be supported by reason and within the purpose of the statute.

C. Private labor tests of negotiability and the public sector

The Board contends that judicial principles used to determine mandatory subjects of bargaining in private employment disputes, such as that in Libby, should not be applied to public sector disputes. The Board sets out a number of differences between private and public labor situations and vigorously argues that public employers must be given greater protection from mandatory bargaining requirements than their private counterparts.

While we recognize the great difficulties inherent in the operation of a local governmental unit, such as a school board, we cannot ignore the mandate of the Municipal Employment Relations Act. For the reasons listed below, we believe that the legislature, in passing the Act, intended that the tests of negotiability propounded in private labor disputes should be applied to the public sector.

First, it appears that the Act became law within one month of LaCrosse County Institution Employees v. WERC, 52 Wis. 2d 295 (1971). That case so exposed the inequities of the public employee's labor status that two justices were moved to call upon the legislature to act "to assure to municipal employees the same basic right to collective bargaining as is extended to union members employed by the private sector" (at 303). The exception in the statute for "subjects reserved to management and direction" appears to have been taken directly from the "entreprenuerial control" test used to exempt certain private employers' decisions from bargaining requirements.

Most states have, within the last decade, enacted legislation similar to the Municipal Employment Relations Act. Commentators are agreed that the purpose of such statutes is to provide public employees negotiating rights similar to those enjoyed by their counterparts in the private sector. "Developments in Municipal Labor Law," Moberly, 42 Wis. Bar Bull. 16 (Dec. 1969), "Municipal Employment in Wisconsin." 1965 Wis. L. Rev. 652 (Summer), "Negotiation and Participation in Concerted Activities by Public School Teachers," 49 Marquette L. Rev. 512 (1966).

The Wisconsin Supreme Court, in Joint School Dist. #8, supra, left no doubt as to the applicability of private labor law principles to questions of bargainability in the public sector. The "basic educational policy" test set out in that case seems to be derived from the "basic direction of the employer" test used to determine whether a subject must be negotiated in the private sector.

In fact, in determining that the school calendar was a subject of mandatory bargaining for school boards, the court in Joint School Dist. #8 relied on the U.S. Supreme Court's application of the National Labor Relations Act to a private labor dispute. The Wisconsin Court at 491 quoted Meat Cutters v. Jewel Tea, 381 U. S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965).[2]

Accordingly, we conclude that the principles used to determine negotiability in private disputes are applicable to public labor disputes.

III. The bargaining requirements of Wis. Stats. 111.70 and the governmental powers of school boards.

The Board contends that the Municipal Employment Relations Act must be read as reserving to local governmental units managerial rights paramount to the interests of employees, so that, in balancing the interests of employees and management, management's interests must prevail where management is acting within its statutory authority.

There are two bases for that argument. The first is Wis. Stats. ch. 40, which vests school boards with broad legislative powers in the operation of schools, including, presumably, the right to manage and operate a food service program. The Wisconsin Supreme Court has left no doubt of the relationship between Wis. Stats. 111.70 and ch. 40. The former was enacted more recently and is to be given a broad application. The ch. 40 powers of school boards are subject to and limited by the bargaining requirements of Wis. Stats. ch. 111.70 et seq. Muskego-Norway v. Wisconsin E.R. Board, 35 Wis. 2d 540, 555-58 (1967), Joint School Dist. #8 v. Wis. E.R. Board, supra. So the fact that the school board is authorized by ch. 40 to manage and operate a food service program does not make that management and operation immune to the bargaining requirements of Wis. Stats. 111.70.

The second basis for the Board's argument is its construction of the last sentence of Wis. Stats. 111.70(1)(d), which it reads as requiring that the rights of the public, which rights the Board would impute to itself, are always paramount to those of the labor organization in negotiability disputes. The Board's argument here was explicitly rejected by this court, speaking through Reserve Circuit Judge Currie, in City of Beloit v. WERC, supra, at pp. 3-5:

> "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, ie., matters of public policy.
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> "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." (Emphasis added.)

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[2] In support of its contention that private labor principles should not be applied to negotiability disputes in the public sector, the Board points to the fact that Wis. Stats. 111.70(1)(d) expressly protects decisions on subjects reserved to management and direction of the governmental unit from mandatory bargaining requirements, while the private labor statutes, Wis. Stats. 111.02(5) and 111.06(1)(d), contain no such express reservation for management.

The difference in the language of the statutes on that point is of no consequence. Courts have traditionally construed private employer labor statutes as immunizing certain managerial decisions--those which affect the enterprise's basic direction--from mandatory bargaining requirements. Libby, supra. The statutory exemption of certain managerial decisions of local government from bargaining requirements is merely a codification of the exemption enjoyed by private employers.

IV. Equal Protection

The Board claims that the bargaining requirements imposed by the statute violate the constitutional doctrine of equal protection because such bargaining provides union members with a greater input into the Board's decision-making process than that exercised by the rest of the community. The Board grounds its argument on the one man-one vote principle. Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L.Ed. 2d 821 (1963).

We reject the Board's argument here for a number of reasons.

First, as a municipality, the Board cannot attack the constitutionality of a statute. West Milwaukee v. Area Bd. Vocational, T. & A. Ed., 51 Wis. 2d 356, 365 (1971), appeal dismissed, 404 U. S. 981, 92 S. Ct. 452, 30 L. Ed. 2d 364.

Second, the power accorded the union employees by Wis. Stats. 111.70 et seq. is simply to bargain. Neither our holding nor the statute require the school board to reach any kind of agreement with the union.

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

(See also Joint School Dist. #8, supra, at pp. 494-5.)

An example should suffice to illuminate the third fatal weakness in the Board's argument. In order to effectuate its purposes, governmental units are often required to contract with private parties. The terms set for such contracts by private parties affect governmental decisions. For example, a municipality may decline to undertake certain construction because of the costs set for such construction by private contractors. In setting those costs, the private contractors obviously exercise a greater input into the municipality's decision-making than that exercised by other citizens. Does that fact indicate a denial of equal protection? The answer is obvious. There are many more examples which illustrate the point. The fair operation of government requires that citizens be given some special input into governmental decisions which affect them more directly than the rest of the citizenry. A school board's decision to contract out its food service program is obviously of much greater impact on school food service employees than on other citizens. Hence, there is a reasonable basis for a distinction in the law between those employees and others.

Finally, we note that the constitutionality of municipal labor legislation has been securely established. Joint School Dist. #8. The Board's equal protection attack here brings to mind the observation of the court in Joint School Dist. #8, supra, at 493:

> "Government officials must exercise greater flexibility and ingenuity, therefore, to arrive at a workable procedure for dealing with municipal labor matters. The only alternative is to resist application of the existing law. Arguments of unconstitutionality (illegal delegation and challenge of sovereignty) may sound temporarily appealing to a government official who is set in his ways but judicial rulings are steadfastly affirming municipal labor legislation" (Quoting "A Municipality's Rights and Responsibilities Under the Wisconsin Municipal Labor Law," 49 Marq. L. Rev. 512, 513 (1966).

V. Remand

In the event that we do not reverse the Commission's decision, the Board urges us to remand so that it may present evidence related to the "essential enterprise" test applied by the Commission here. The Board claims that standard was created by the Commission after the hearing in this case.

It appears to us, however, that the "essential enterprise" standard is nothing more than a restatement of the "basic educational policy" test advanced in 1967 by the court in Joint School Dist. #8, supra, to distinguish between compulsory bargaining subjects and subjects "reserved to management and discretion of the local governmental unit." Therefore, we conclude that fairness does not require a remand here.

VI. The Commission's power to issue the instant remedial order

The Commission is vested by statute with broad powers to enforce and effectuate the purposes of its orders.

> "Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed. . .and require him to take such affirmative action, including reinstatement of employes with or without pay, as the commission deems proper. . . ." Wis. Stats. 111.07(4).

The Commission's Order here is reasonably calculated to effectuate the purposes of the Municipal Employment Relations Act and is therefore proper.

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The Commission Order of October 17, 1974, is affirmed and the petition for its enforcement is granted.

Dated: October 21, 1975.

BY THE COURT

William C. Sachtjen /s/

William C. Sachtjen, Judge