STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

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WISCONSIN FEDERATION OF TEACHERS,
AFT, AFL-CIO,

Petitioner,

No. 432-506

-vs-

Decision No. 13267-A

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

- -

MEMORANDUM DECISION ON PETITION FOR REVIEW OF DECISION AND DECLARATORY RULING OF WISCONSIN EMPLOYMENT RELATIONS COMMISSION

This action arises as a result of a dispute between the Wisconsin Federation of Teachers, AFT, AFL-CIO, and the State of Wisconsin as to what certain hours of the day or night the parties should spend in negotiating toward a new collective bargaining agreement.

On November 20, 1974, the Wisconsin Federation of Teachers, AFT, AFL-CIO (hereinafter WFT) and the State of Wisconsin, parties to a collective bargaining agreement which was to terminate on June 30, 1975, met to establish ground rules for the negotiation of a new collective bargaining agreement. At this meeting, the WFT requested that negotiations not be held during normal working hours or, in the alternative, that the State release certain employes with pay to attend bargaining sessions held during normal working hours. The State denied this request, indicating that it would initially meet only during normal working hours with employes on petitioner's bargaining team being released without pay, or they could charge such time to their accrued vacation or holiday credits. The State further indicated that, depending upon the progress in the negotiations, it might later agree to meet outside normal working hours.

The WFT petitioned the Wisconsin Employment Relations Commission (WERC) on December 31, 1974, for a declaratory judgment declaring that the State's denial of this request constituted a refusal to bargain in good faith under Section 111.81 (2), Wis. Stats. (1973). On May 21, 1975, WERC issued a decision and declaratory ruling stating that the State had not refused and was not refusing to bargain in good faith. The WFT has petitioned this Court for review of the WERC decision.

The WFT contends that the State's refusal to meet outside normal working hours was a unilateral action on the part of the employer and thus must be found to be a refusal to bargain per se. In support of this proposition, WFT cites NLRB v. Katz, 369 U.S. 736 (1963). The Supreme Court in Katz found the employer's unilateral action to be a refusal to bargain per se. That case is distinguishable from the case before this Court.

In NLRB v. Katz the employer had, without prior discussion with the union, effected changes in certain conditions of employment which were at that time subject to negotiation. The Court stated the rule that where a party has

refused to negotiate in fact about any of the mandatory subjects, there is no need to consider the issue of good faith in order to find a violation of the duty to bargain collectively. The conduct of the employer in Katz was found to be such a refusal in fact, and therefore a per se violation of the duty to bargain collectively.

The instant case does not involve a unilateral action on the part of the State which constitutes a refusal in fact to negotiate about mandatory subjects, such as wage rates and working conditions. The dispute between the parties is over procedural considerations. The State is completely willing to meet and confer over the subjects of negotiation, and there is no showing that the WFT has been significantly hindered in its ability to collectively bargain. This Court does not believe that the rule in NLRB v. Katz is to be so broadly interpreted as to apply to the facts of this case.

This distinction between dispute over negotiations about the mandatory subjects and dispute over procedural considerations is apparent in the treatment of those issues by the National Labor Relations Board in Borg-Warner Corp., 198 NLRB No. 93, 80 LRRM 1790 (1972). In its discussion of procedural considerations the Board stated that the employer's refusal to release employes on the union's negotiating committee from work in order to allow those employes to participate in bargaining sessions was not a per se violation of the duty to collectively bargain.

In addition, as to the unilateral selection by the employer of the time for bargaining sessions, the Board found that such conduct was only evidence of the employer's design to avoid bargaining. The decision in Borg-Warner Corp. which ordered the employer to cease and desist from refusing to bargain was based not upon these procedural considerations but upon the totality of the employer's conduct.

On the basis of the above, it is clear to this Court that the State's conduct in this case does not constitute a per se violation of its duty to collectively bargain.

Section 111.81 (2) of the Wisconsin Statutes defines "collective bargaining" as follows:

> "'Collective bargaining' means the performance of the mutual obligation of the state as an employer, by its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in s. 111.91 (1) . . . ."

In order to constitute a refusal to bargain collectively, it must be shown that the State has refused to meet at a reasonable time. The question, therefore, becomes whether or not a requirement that the meetings be held during normal working hours in unreasonable.

The construction and interpretation of a statute adopted by an agency charged with the duty of applying the law is entitled to great weight. Cook v. Industrial Comm., 31 Wis. 2d 232, 240, 142 N.W. 2d 827 (1966).

> Where ". . . the WERC's determination is neither without reason nor inconsistent with the purposes of the statute, (and) since that is the ultimate test, . . . the determination of the WERC will be affirmed." Milwaukee v. Wisconsin Employment Relations Comm., 43 Wis. 2d 596, 602, 168 N.W. 2d 809 (1969).

It must be remembered that "The duty to bargain . . . does not compel either party to agree to a proposal or require the making of a concession." Wis. Stats., Section 111.81 (2) (1973). There has been no showing that meeting during

working hours will substantially hinder the ability of the union to negotiate. In the absence of something more than a single instance of disagreement over a particular procedural consideration, the Court does not believe that the record shows evidence sufficient to require a reversal of the WERC's decision.

The decision of the Wisconsin Employment Relations Commission is hereby affirmed.

Dated at Milwaukee, Wisconsin, this 5th day of March, 1976.

Harvey L. Neelen /s/
Circuit Judge