STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, Petitioner, vs. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	#152-068 MEMORANDUM DECISION Decision No. 13807-A

This petition for review is from a decision of the respondent, Wisconsin Employment Relations Commission, issued on April 30, 1976, in which it declared:

> "1. Article IV, Sec. 26, Wisconsin Constitution does not prohibit retroactive application of negotiated wage rates and/or other subjects of economic import.
>
> "2. The effective date of a collective bargaining agreement, including its retroactive applications, is a mandatory subject of collective bargaining over which the petitioner has the right to bargain within the meaning of Sections 111.81(2), 111.82 and 111.91 of the State Employment Labor Relations Act."

The facts of this petition for review are not in dispute. The AFSCME, Council 24, Wisconsin State Employees' Union, and AFL-CIO, hereinafter referred to as the Union, has been and is the exclusive collective bargaining representative for approximately 15,000 state employees. Petitioner, State of Wisconsin, is the employer of all state employees, which employment relationship is implemented through the Department of Administration pursuant to sec. 111.81(16), Wis. Stats. Respondent, Wisconsin Employment Relations Commission (WERC), is an administrative agency empowered to act under and pursuant to the provisions of Chapters 111 and 227, Wis. Stats. Pursuant to sec. 227.06, Wis. Stats., the WERC may issue declaratory rulings with respect to the applicability of Chapter 111, Wis. Stats., to a state of facts.

Petitioner and the union entered into collective bargaining relating to wages, hours and working conditions for the employees represented by the union. During the bargaining sessions, the union requested, but petitioner refused, to bargain with respect to the retroactive application of their agreement. Therefore, on February 10, 1975, the union filed with WERC a petition requesting a declaratory ruling, pursuant to sec. 227.06, Wis. Stats., on the applicability of Art. IV, Sec. 26, Wisconsin Constitution, and Chapter 111, Wis. Stats., to said issue. [Case LVI, No. 18825 DR(S)-9] A hearing was held by the WERC on October 27, 1975, and on April 30, 1976, the WERC reached the decision set forth above. On May 26, 1976, petitioner filed this petition for review.

There are two questions presented to the court for its decision:

1. Does Article IV, Section 26, Wisconsin Constitution, which states in part that, "The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into;...," prohibit the retroactive application of wage rates and/or other subjects of economic import?

2. Is the retroactive application of a collective bargaining agreement a mandatory subject of collective bargaining over which the state has the duty to bargain within the meaning of secs. 111.81(2), 111.82 and 111.91 of the State Employment Labor Relations Act?

As to the first question, the court is of the opinion that Article IV, Sec. 26, Wisconsin Constitution, does not prohibit retroactive application of negotiated wage rates or other subjects of economic import in a collective bargaining agreement because the prohibition in Art. IV, Sec. 26, Wisconsin Constitution, is limited to "extra compensation."

Article IV, Sec. 26, Wisconsin Constitution, reads in relevant part:

> "The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into;...." (Emphasis added.)

The respondent here concluded that this constitutional provision does not prohibit retroactive application of negotiated wage rates and other subjects of economic import to the expiration date of the previous contract. The petitioner claims that this conclusion means that "the legislature is free to increase wage rates or other economic benefits after the services have been rendered and in excess of the agreed amount." The error is in the assertion that the negotiable matters are in "excess of the agreed amount."

The prohibition imposed by Article IV, Sec. 26, is "extra" compensation. There cannot be extra compensation until there has been some level of compensation determined. Thus, on its face, Article IV, Sec. 26, does not prohibit payment for services either before or after they have been rendered. The prohibition is that no "extra compensation" is allowed either (1) after the services shall have been rendered, or (2) the contract entered into.

In State ex rel. Thomson v. Giessel, 262 Wis. 51, 63-4, 53 N.W. 2d 726 (1951), the court commented on the meaning of Article IV, Sec. 26:

> "They knew the meaning of every word in the article and the meanings have not changed with the passage of time. 'Services,' 'contracts,' and 'compensation' are not new terms or new concepts. The language of the article admits of no doubt that it was the intent of the draftsman who prepared it and the electors who adopted it that, when a person rendered public service for compensation agreed upon, his right to compensation depended upon and was limited by his agreement.
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> "The 'exact measure of his right is determined absolutely by his contract, under the constitution; and there exists nowhere discretion to vary it.' Carpenter v. State, 39 Wis. 271, 283 (1876)." (Emphasis added.)

Where the relationship between the employer and employee is governed by contract, as in the instant case, the applicability of Article IV, Sec. 26, will necesarily depend on the details of that contractual relationship. Here the facts assumed for purposes of the declaratory ruling make clear that retroactive application of contract terms, including, for example, increased wages, is for a period following the expiration of one contract and the execution of a new one. The assumed facts here are that the parties have not agreed to the amount of compensation for the period during which, in fact, there was no contract.

We have concluded that the retroactive application of negotiated wage rates in the collective bargaining context is not extra compensation, and, therefore, there is no violation of Article IV, Sec. 26, Wisconsin Constitution.

The case law interpreting Article IV, Sec. 26 is clear. Extra compensation is prohibited. In two cases by the same name the state supreme court outlined the conditions under which the Article IV, Sec. 26, prohibition would attach. In State ex rel. Thomson v. Giessel, supra, 262 Wis. 51, 53 N.W. 2d 726 (1951), (hereinafter referred to as the first Giessel case) the court held unconstitutional additional annuity payments to teachers who were already retired. The court considered the annuity payments extra compensation because they were not granted until after the teaching contract had not only been entered into, but the teachers' services had been performed and the teachers affected had already ceased to serve. The court defined extra compensation as that phrase is used in Article IV, Sec. 26 to mean "compensation outside of and in addition to that compensation previously agreed upon." 262 Wis. 51, 55, at 63-4. See also Carpenter v. State, 39 Wis. 271 (1876). In the instant case, the factual setting clearly demonstrates that the wages and other matters of economic import subject to collective bargaining do not constitute extra compensation as proscribed by the constitution.

In State ex rel. Thomson v. Giessel, 265 Wis. 558, 61 N.W. 2d 903 (1953), (hereinafter referred to as the second Giessel case) the court examined legislation passed in response to the first Giessel case. That legislation provided for the rehiring of retired teachers on a stand-by basis and paying them compensation in the form of increased pensions for such stand-by services. The second Giessel case demonstrated that, where compensation in the form of increased pension benefits was paid to teachers to induce them to remain available for future service, there was no violation of Article IV, Sec. 26, Wisconsin Constitution. Since such payments were for future service, they could not be considered extra compensation for past service.

Earlier, in State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 193 N.W. 499 (1923), the court reached essentially the same conclusion it reached in the second Giessel case. There, the creation of a teacher's retirement plan, which based annuity payments on length of past service, was held to comply with Article IV, Sec. 26, because the payments were considered an inducement to teachers to remain in service longer so that the state might better maintain an effective and efficient teaching force.

Together these cases establish that Article IV, Sec. 26, is not violated where: (1) The compensation paid is not "extra compensation," as that phrase is used in Article IV, Sec. 26, or (2) Where the compensation is for future services.

Under the factual setting here, there is no violation of Article IV, Sec. 26, because the retroactive wages and other economic matters are not "extra compensation." In addition, as the commission noted, the retroactive payment of increases in wages and other economic matters, although measured by hours already worked, "...can be deemed, as compensation for continuing services by the employes who receive same, and as inducement to remain in the service of the state." The point is that payments based on past service are not necessarily violative of Article IV, Sec. 26, if the purpose is to secure a future benefit for the state. Under either theory, the retroactive payment of negotiated wages and other forms of compensation clearly complies with Article IV, Sec. 26.

Upon the second question, we conclude that the commission was correct in its declaration that the effective date of a contract and the retroactive application of its terms are mandatory subjects of bargaining under the State Employment Labor Relations Act.

This is a legal conclusion, and, while we are not bound by it, we must accord due weight to the expertise of the commission and the discretionary authority delegated to it.

The public policy of this state as to labor relations in state employment is to provide "orderly and constructive employment relations for state employes and efficient administration of state government...." Sec. 111.80(2), Wis. Stats. To this end, the statutes regulate activities leading to a collective bargaining relationship as well as certain activities of the parties after that relationship has been established. Securing labor peace and promoting efficient government through collective bargaining are the overriding purposes germane here.

"Orderly and constructive employment relations...and the efficient administration of state government...[are] dependent upon the maintenance of fair, friendly and mutually satisfactory employe management relations in state employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise...." Sec. 111.80(2), Wis. Stats.

Without question the legislature has determined that peaceful and friendly labor relations can best be achieved through the procedures of collective bargaining.

"It is the policy of this state, in order to preserve and promote the interests of the public, the state employe and the state as an employer alike, to encourage the practices and procedures of collective bargaining...by providing a convenient, expeditious and impartial tribunal in which these interests may have their respective rights determined...." Sec. 111.80(4), Wis. Stats.

Section 111.91, Wis. Stats., sets forth in general the mandatory subjects of collective bargaining.

"(1) Matters subject to collective bargaining to the point of impasse are wage rates, as related to general salary scheduled adjustment consistent with sub. (2), and salary adjustments upon temporary assignment of employes to duties of a higher classification or downward reallocations of an employe's position; fringe benefits; hours and conditions of employment, except as follows:" (The exceptions are not material to the issues herein.)

The statutory scheme set forth in the State Employment Labor Relations Act clearly envisions that the employer-employe relationship will be governed by contract. Sec. 111.81(2), Wis. Stats., provides that, where the parties reach agreement over matters subject to collective bargaining, such agreement may be reduced to a written and signed document. The courts have recognized that collectively bargained agreements give rise to contractual obligations. See Tecumseh Products Co. v. Wisconsin E. R. Board, 23 Wis. 2d 118, 127-9, 126 N.W. 2d 520 (1964); American Motors Corp. v. Wisconsin E. R. Board, 32 Wis. 2d 237, 242-249, 145 N.W. 2d 137 (1966). Thus, the previous state unilateral pay plan and other matters relating to wages, hours and conditions of employment under civil service and other applicable statutes are replaced by the collectively bargained contract. See 111.93(3), Wis. Stats.

Central to orderly and constructive employment relations and the efficient administration of state government is the right of the employes to negotiate the terms of their employment with the state. It is obvious that the important function of a collective bargaining contract to further tranquility in state employment relations justifies--indeed demands--that the employe be allowed to negotiate not only increases in wages but when such increases are to become effective. To hold otherwise would render meaningless the bargaining rights of employes. The commission's conclusion, therefore, that contract terms and their retroactive application to the expiration date of the preceding contract are negotiable is consistent with the give and take which is the essence of collective bargaining.

We believe the commission's analysis of the relevant sections of SELRA to determine if the matters at issue are mandatory subjects of bargaining took into consideration the interests of both the state and the employes. The commission recognized that the legislature has struck a balance between the need for efficient administration of state government on the one hand and the need to provide employes with a meaningful voice in the determination of wage rates and other aspects of the employment relationship on the other. This balancing of interests to determine which matters are mandatory subjects of bargaining has been approved by our supreme court. See e.g. Libby, McNeill & Libby v. Wisconsin E. R. Comm., 48 Wis. 2d 272, 179 N.W. 2d 805 (1970). We must agree that under the ruling the state loses some

certainty in terms of overall fiscal planning, however, is assured that its employes will more likely continue on the job after the expiration date of the previous contract because they know there is a possibility that any increased benefits negotiated at the bargaining table will be made retroactive to the expiration of the previous contract. Without question the public purpose is better served through collective bargaining than through strikes or other procedures typically used by employes to assert their rights.

The commission's conclusion, therefore, is consistent with the overall statutory scheme covering labor relations in the state employment sector. It is also consistent with mandatory bargaining requirements in the private sector. It is settled that effective contract dates are mandatory subjects of collective bargaining in the private sector.

Since the commission's construction of the bargaining requirements set forth in secs. 111.81(2), 111.82, and 111.91, Wis. Stats., is neither without reason nor inconsistent with the purposes of the State Employment Labor Relations Act, we should defer to it.

For the foregoing reasons, the decision of the commission is affirmed.

BY THE COURT:

Dated: June 10, 1977.

William C. Sachtjen /s/

William C. Sachtjen, Judge

c: Niemisto
Fleming
Graylow