COURT OF APPEALS
DECISION

Dated and Released

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NOTICE

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No. 80-291

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

CITY OF WAUWATOSA,

Petitioner-Respondent,

v.

Decision No. 15917

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: RALPH G. GORENSTEIN, Judge. Reversed.

Before Decker, C.J., Moser, P.J., and Cannon, J.

DECKER, C.J. The issue on appeal is whether the duty day, maintenance, and stay provisions proposed by the Wauwatosa Firemen's Protective Association Local 1923, I.A.F.F., are mandatory subjects of bargaining under sec. 111.70(1)(d), Stats., requiring the city to bargain with the Association with respect to these provisions.

This appeal stems from a judgment of the circuit court which set aside and remanded a Wisconsin Employment Relations Commission (WERC) declaratory ruling. The Commission's ruling was made pursuant to sec. 111.70(4)(b), Stats.[1] We reverse the judgment of the circuit court, and reinstate the Commission's ruling.

The City of Wauwatosa (City) and the Wauwatosa Firemen's Protective Association, Local 1923 Association (Local), have been parties to several collective bargaining agreements which covered the City's fire fighting employees. Negotiations for a successor agreement commenced in 1976. On April 21, 1977, the City petitioned WERC for a declaratory ruling under sec. 111.70(4)(b), Stats., of the Municipal Employment Relations Act (MERA)[2] to determine whether the City was required to bargain on ten provisions incorporated in the Local's proposal for a successor agreement.

On November 9, 1977, WERC, following a hearing on May 16, 1977, ruled that the City was required to bargain under sec. 111.70(1)(d), Stats., MERA,[3] with respect to four of the ten provisions. On December 8, 1977, the City sought a circuit court review of WERC's ruling on three of the four provisions. The three provisions are the subject of this appeal. They are:

1. Duty Day Provision

> The duty day shall terminate for the purposes of cleanup, training procedures, and other regular routines on or before 5:00 P.M. The balance of the twenty-four hour period shall be spent in stand-by awaiting and/or serving in matters of emergency and occasional public relations demonstrations as may be reasonably required.

2. Maintenance Work After 5:00 P.M. Provision

> Maintenance and servicing of equipment, vehicles, and other property after 5:00 P.M. shall be solely limited to items necessary for efficient response to alarms. Apparatus room floors should be made reasonably safe and dry in all areas utilized by men in response to alarms. Normal vehicle and house cleanup will be postponed to the following duty crew.

3. Stay Provision

> The filing of any grievance pertaining to non-fire and/or non-emergency functions, shall cause a stay of the ordered activity and possible resulting disciplinary action, pending the ultimate determination of the merits of the grievance providing that the executive board of the Association invokes such stay by including such in the filing of the grievance submitted to the Chief ... .

On December 17, 1979, the circuit court set aside WERC's declaratory ruling as to the three provisions and remanded the case pursuant to secs. 227.20(5) and (6), Stats.[4] The WERC appeals the circuit court's judgment.

Before we address the issue on appeal, it is necessary to determine this court's standard of review.

The general rule in this state for reviewing agency decisions is 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." Beloit Education Ass'n v. WERC, 73 Wis.2d 43, 67, 242 N.W.2d 231, 242 (1976). Any rational basis will sustain the practical interpretation of the agency charged with enforcing a statute. Id. at 67, 242 N.W.2d at 242.

The court in Beloit Education Ass'n decided not to apply the general rule when it reviewed the Commission's declaratory rulings as to whether certain proposals from a teacher's association were mandatory subjects of bargaining. Id. The court observed that the petition for declaratory ruling raised "very nearly questions of first impression." Id. The petition required interpretation of sec. 111.70(1)(d), Stats., to determine the areas of mandatory bargaining between a school board and a teacher's association. Id. Given that situation, the court held that it was not "bound by the interpretation given to a statute by an administrative agency," id., although WERC rulings should be given "due weight" or "great bearing" when the reviewing court interprets the statute in question. Id. The "great weight" or "any rational basis rule" would not apply unless the administrative practice was "long continued, substantially uniform and without challenge by governmental authorities and courts." Id. at 67-68, 242 N.W.2d at 242-43.

We agree with appellant's contention that since the decision in Beloit Education Ass'n, the WERC has accumulated "much experience" in determining the scope of collective bargaining in the public sector.[5] We note that the WERC's experience includes determinations as to permissive and mandatory subjects of bargaining between fire fighter collective bargaining representatives and municipalities.[6] We are no longer faced with a "poverty of administrative experience" due to recent passage of MERA, see Whitefish Bay v. WERB, 34 Wis.2d 432, 444-45, 149 N.W.2d 662, 669 (1967),

nor is this a case where the WERC is attempting to expand its scope of authority beyond the limits of the legislative enactment contained in ch. 111 by interpreting a statute not within the field of labor law. See City of Brookfield v. WERC, 87 Wis.2d 819, 826-28, 275 N.W.2d 723, 726-27 (1979). We conclude that the general rule should be applied in this case. The court will give great weight to the WERC's rulings and defer to them when any rational basis sustains the WERC's practical interpretation of the statute it is charged with enforcing.

Applying the "great weight" standard of review, we turn to the issue on appeal. Our supreme court has stated that the test to apply when determining if various proposals are mandatorily bargainable under sec. 111.70(1)(d), Stats., is whether the proposal "primarily relates to wages, hours and conditions of employment." Beloit Educational Ass'n, supra, at 54, 242 N.W.2d at 236.

Duty Day Provision

The WERC ruled that the duty day provision constituted a mandatory subject of bargaining as it primarily relates to hours. We defer to this ruling, and conclude that there is a rational basis for the ruling that this provision primarily relates to conditions of employment.

Fire fighters work a twenty-four hour tour of duty. The tour begins at 8:00 a.m. The duty day provision proposes an eight-hour duty day which will terminate at 5:00 p.m. for activities such as cleanup, training, and regular routines. The balance of the twenty-four hour tour is to be spent on standby or performing emergency matters. The provision also allows for fire fighters to occasionally perform public relations demonstrations after 5:00 p.m. The WERC found that this proposal primarily relates to the number of hours fire fighters will spend in active work other than fighting fires. The Commission observed that the rest periods within the ordinary work day are mandatory subjects of bargaining.[7]

Giving "great weight" to the WERC's view, we agree with its interpretation that the matter is a subject for mandatory collective bargaining pursuant to sec. 111.70(1)(d), Stats. The record amply supplies a rational basis for the WERC conclusion that the duty day proposal primarily relates to the hours fire fighters will spend actively working in matters other than emergencies. The proposal also relates to the amount of work fire fighters will perform during their tour of duty. Therefore, it primarily relates to hours and working conditions.

The City's position is that the duty day provision restricts the type of duties required of fire fighters within the paid twenty-four hour tour. The City cited Oak Creek-Franklin Joint School District, WERC Dec. No. 11827E (Sept. 12, 1974) and Beloit Education Ass'n to support its position that proposals which attempt to regulate the duties assigned during a scheduled work day are permissive subjects of bargaining. The WERC concluded that the City's reliance on Oak Creek was misplaced. Our reading of the Oak Creek decision supports the WERC's position, as the proposals in Oak Creek were found to be permissive solely because they implicated questions of educational policy. Likewise, the court in Beloit Education Ass'n agreed with the WERC's findings that a variety of in-service training proposals were not mandatory subjects of bargaining, as the proposals had only a minor impact on working conditions as compared to the impact on educational policy. Beloit Educational Ass'n, supra, at 62-63, 63 n. 33, 242 N.W.2d at 240, 240 n. 33.

The City argues that the duty day provision is permissive because it has an adverse impact on the fire department's training objectives. We defer to the WERC's analysis that the question "whether an item is a mandatory subject of bargaining is not controlled by the fact that such item, if included in a collective bargaining agreement, would have a substantial impact on the employer's ability to provide public services."[8] Rather, the test is whether the proposal primarily relates to wages, hours, or conditions of employment.[9]

Maintenance Provision

The WERC concluded that the maintenance provision primarily related to hours and conditions of employment, thereby constituting a mandatory subject of bargaining. Applying the "great weight" standard of review, we agree.

The maintenance proposal limits the amount of maintenance and servicing work fire fighters will perform after 5:00 p.m. Excepted from the proposal is work necessary for efficient response to alarms. Normal vehicle and house cleanup would be postponed for the following duty crew.

The City contends that the proposal is permissive because it involves determining when duties can be assigned within the established work day. The City asserts that its arguments in support of its position on the duty day proposal also support its position on the maintenance proposal.

The WERC found that the maintenance proposal concerned the amount of work to be performed by fire fighters who have already expended eight hours of active work. Routine maintenance on vehicles and the station house after 5:00 p.m. was found to be unnecessary for providing essential fire protection. These findings are supported by the record and constitute a rational basis for the WERC's interpretation of sec. 111.70(1)(d), Stats.

Stay Provision

The WERC ruled that the essence of the stay proposal was to protect contractual benefits and secure contract compliance. Thus, the WERC contends, the proposal primarily related to wages, hours, and conditions of employment and is a mandatory subject of bargaining.

The stay provision provides that the filing of any grievance which relates to a non-fire or non-emergency function shall result in a stay of the ordered activity or disciplinary action for noncompliance until the merits of the grievance are resolved. The executive board of the Association must expressly invoke the stay provision when filing the grievance with the chief.

The City contends that the stay provision is permissive, as it empowers the Association to delay implementation of management decisions which may be permissive in nature. Because the stay provision encompasses permissive subjects of bargaining, the City argues that the proposal itself is permissive. The WERC ruling noted that the word "grievance" effectively limited the stay provision to those permissive items which the employer voluntarily agreed to in the collective bargaining agreement.

We believe that the broad sweep of this poorly-drafted proposal is a trap for the unwary fire department supervisor or member of the local. Only the most sophisticated reading of the proposal points to its limited application. Solely because WERC has circumscribed its application to protecting contracted benefits do we defer to its ruling.

By the Court.--Judgment reversed and remanded with directions to enter judgment consistent with this opinion.

Recommendation: Not recommended for publication in the official reports.

APPENDIX

[1]Wauwatosa v. Wauwatosa Firemen's Protective Ass'n, Local 1923, WERC Dec. No. 15917 (Nov. 9, 1977).

[2]Section 111.70(4), Stats., provides:

> (4) Powers of the commission. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

Section 111.70(4)(b) provides:

> (b) Failure to bargain. Whenever a dispute arises between a municipal employer and a union of its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

[3]Section 111.70(1)(d), Stats., establishes the right of "collective bargaining" in the public sector in this state. Beloit Educ. Ass'n v. WERC, 73 Wis.2d 43, 49, 242 N.W.2d 231, 234 (1976). Section 111.70(1)(d) provides:

> (d) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, 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 duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document. 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.

[4]Sections 227.20(5) and (6), Stats., state:

> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

[5]Weisberger, The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience, 1977 Wis. L. Rev. 685, 714-15, 720-25, 731.

[6]Waukesha and Local 407, WERC Dec. No. 17830 (May 23, 1980); Fire Fighters Local 808 and Shorewood, WERC Dec. No. 11716 (March 26, 1973); Fire Fighters Local 2051 v. Brookfield, WERC Dec. No. 11406 (July 27, 1973); Local No. 74 v. Superior, WERC Dec. No. 11560B (April 24, 1974); Fire Fighters Local 1923 v. Wauwatosa, WERC Dec. No. 13109A (June 6, 1975); Local 847, Merrill Fire Fighters v. Merrill, WERC Dec. No. 15431 (April 13, 1977); Local 1923 v. Rice Lake, WERC Dec. No. 16413 (June 20, 1978). Unlike Berns v. WERC, No. 79-359, _____ Wis.2d _____, _____ N.W.2d _____ (Nov. 24, 1980), this is not a case where there is no long-standing practice or position of the WERC regarding the statute here in question, sec. 111.70(1)(d), Stats., and its subject matter, mandatory subjects of bargaining.

[7]Fleming Mfg. Co., 119 NLRB 452, 453, 41 LRRM 115 (1957); In re National Grinding Wheel Co., 75 NLRB 905, 906, 21 LRRM 112 (1948).

[8]Wauwatosa v. Wauwatosa Firemen's Protective Ass'n Local 1923, WERC Dec. No. 15917 (Nov. 9, 1977).

[9]Id. We note that the respondent does not contend that the duty day provision constitutes a prohibited subject of bargaining within the meaning of sec. 111.70(1)(d), Stats., MERA.