

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XXIII
No. 23508 DR(M)-100
Decision No. 16640-A

No. 16640-A

3. That the District and the Federation were parties to a collective bargaining agreement, in effect during 1976-1978, covering the wages, hours and working conditions of the above-noted employees; that during the course of their collective bargaining leading to a successor collective bargaining agreement issues arose between the parties with respect to the inclusion in the new collective bargaining agreement of certain provisions which were contained in the 1976-1978 agreement, in that, contrary to the Federation, the District contended that said provisions relate to non-mandatory subjects of bargaining; and that said provisions are as follows:

"ARTICLE I RECOGNITION AND SCOPE

. . .

Section B - Implementation

. . .

7. The Board, or its representatives, shall meet, from time to time, with the representatives of the Federation, at the request of either party, to discuss matters of educational policy and development, as well as matters relating to the implementation of this Agreement.

Section C - Employee Facilities

1. Existing teachers' lounges and restroom facilities shall be maintained, and furnished, subject to the physical limitations of the existing District buildings, and the lease agreements under which such buildings are held by the District.

2. Provisions for teachers' lounges and restroom facilities and teacher parking facilities, shall be developed in consultation with the Federation for all new school construction considered by the District.

3. The Board shall make available for each teacher a desk, office space, and related office equipment, subject to existing physical limitations of the District facilities.

. . .

ARTICLE III FAIR PRACTICES

Section A

The Board shall not discriminate against any employee on the basis of race, creed, national origin, sex, age, marital status, political affiliation, or membership in or association with the activities of any employee organization.

Section B

The Board shall make certain that teacher application forms and oral interview procedures shall omit therefrom any reference to items listed in Section A above.

. . .

ARTICLE V GRIEVANCE PROCEDURE

Section A - Definitions

1. A grievance is a complaint by an employee of the bargaining unit, or by the Federation where:

(a) A policy or practice is alleged to be improper or unfair, or

(b) There has been an alleged deviation from, an alleged misinterpretation, or an alleged misapplication of a practice or a policy, or

(c) There has been an alleged unfair or inequitable treatment by reason of an act or condition contrary to existing policy or practice, or

(d) There has been an alleged violation, misinterpretation, or misapplication of any agreement existing between the parties hereto.

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ARTICLE VI CONDITIONS APPLICABLE TO TEACHING DUTIES

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Section E - Teaching Load (2)

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2. Definitions

(1) Student Contact Period - Fifty-three (53) minutes of instructional time devoted to instruction in the presence of the student.

. . .

Section F - Academic Freedom and Responsibility

1. The policy of the District is to encourage the teaching, investigating and publishing of findings in an atmosphere of freedom and confidence.

2. This philosophy is based on the belief that when students have the opportunity to learn and acquire knowledge from a variety of sources and opinions in an atmosphere of honest and open inquiry, they will develop greater knowledge and maturity of judgment.

3. Therefore, the freedom of each teacher to present within his classroom the truth as he understands it in relation to his area of professional competence is essential to the purposes of our school and society and shall continue to be upheld by the Board and the administration.

4. When the teacher speaks or writes as a citizen, he shall be free from administrative and school censorship and discipline. However, the teacher has the responsibility to clarify the fact that he speaks as an individual and not in behalf of the school.

Section G - Clerical Assistance

Clerical assistance shall be provided for teachers to type tests, school business letters, prepare dittos, operate copy machines, prepare transparencies and other duties related to the instructional process. Requests for such assistance and the preparation of such documents, shall be made not less than one (1) full school day before such items are required, and completion shall be based on priority of request.

. . .

Section O - Discipline Policy

1. It shall be the duty and responsibility of each teacher to maintain proper class discipline. Every teacher shall have the right to dismiss from class any student causing serious disruption to classroom proceedings.

2. Any teacher dismissing a student from class for disciplinary purposes, shall immediately submit a written report of the incident and causes requiring such dismissal to his or her immediate supervisor. Before any student, dismissed from class by a teacher for disciplinary reasons, shall be permitted to return to such class, that student shall be counseled and effective administrative action shall be taken to prevent further classroom activities by said student before such student is permitted to return to the classroom.

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ARTICLE X RULES GOVERNING THIS AGREEMENT

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Section C - Staff Handbook

Any Professional Staff Handbook is considered not to apply to those rights, benefits, and responsibilities which are covered by this agreement between the Federation and the Board.

. . ."

4. That the following provisions, or portions thereof as indicated, in issue in the instant proceeding, primarily relate to educational policy and/or management and the direction of the District, rather than to wages, hours and conditions of employment:

a. Article I, Section B, 7. as it relates to the requirement that the District shall meet and discuss matters of educational policy and development.

b. Article I, Section C, 1. and 2.

c. Article III, Section B.

d. Article V, Section A, 1. (a), (b) and (c).

e. Article VI, Section E with respect to that portion relating to "Student Contact Period."

f. Article VI, Section F, 1, 2, 3 and 4.

g. Article VI, Section G.

h. Article VI, Section O.

5. That the following provisions, or portions thereof as indicated, in issue in the instant proceeding, primarily relate to wages, hours and conditions of employment of teachers in the employ of the District, rather than to educational policy and/or management and the direction of the District:

a. Article V, Section A, 1. (d).

6. That there are no facts upon which the Commission can make a determination as to whether the provision in Article I, Section C, paragraph 3 primarily relates to wages, hours or conditions of employment, or as to whether said provision primarily relates to the management of the District's facilities.

7. That Article X, Section C is so ambiguously worded that the Commission cannot determine whether said proposal relates primarily to wages, hours or conditions of employment or whether it primarily relates to the management of the District.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the disputed contractual provisions, or the portions thereof, referred to in paragraph 4 of the Findings of Fact, and as fully set forth in paragraph 3 of the Findings of Fact, relate to non-mandatory subjects of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

2. That the disputed contractual provision, referred to in paragraph 5 of the Findings of Fact, and as fully set forth in paragraph 3 of the Findings of Fact, relates to a mandatory subject of bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING

1. That the Blackhawk Vocational, Technical and Adult Education District has no duty to bargain collectively with the Blackhawk Teachers' Federation, Local 2308, WFT, AFT, AFL-CIO, within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act, with respect to the provisions, or portions thereof, determined by the Wisconsin Employment Relations Commission to relate primarily to educational policy and/or to the management of said District, as previously set forth in the Findings of Fact and in the Conclusions of Law.


2. That the Blackhawk Vocational, Technical and Adult Education District has a duty to bargain collectively with the Blackhawk Teachers' Federation, Local 2308, WFT, AFT, AFL-CIO, within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act, with respect to the provision determined by the Wisconsin Employment Relations Commission to primarily relate to wages, hours and conditions of employment, as previously set forth in the Findings of Fact and in the Conclusions of Law.


Given under our hands and seal at the
City of Madison, Wisconsin, this 29th
day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

BLACKHAWK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, XXIII,
Decision No. 16640-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

During the course of negotiations on a collective bargaining agreement to succeed the 1976-1978 agreement between the District and the Federation, the Federation desired to include in the new agreement certain provisions which had been included in the 1976-1978 agreement. The District contended that some of said provisions related to non-mandatory subjects of bargaining and therefore it had no duty to bargain with respect to same. The Federation took an opposing view. Although the parties ultimately reached an accord on the 1976-1978 agreement, their dispute as to the disputed provisions remained unresolved, and the District filed the instant petition seeking a declaratory ruling on the provisions in issue.

Factors to be considered by the Commission and the courts regarding the distinction between mandatory and non-mandatory subjects of bargaining have been set forth by our Supreme Court in Unified School District of Racine County vs. WERC 1/ as follows:

"The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people.

. . .

Bargaining is not required, however, with regard to educational policy and school management and operation or the management and direction of the school system."

The procedure for mediation-arbitration to resolve impasses in collective bargaining 2/ did not alter the applicability of the foregoing standard, and we therefore reject the Federation's contention contrary to such a conclusion. Further, the fact that non-mandatory subjects of bargaining were included in a collective bargaining agreement between a labor organization and a municipal employer does not transform such subjects into mandatory subjects of bargaining in negotiations with respect to a successor agreement. 3/

The Provisions Involved

"ARTICLE I RECOGNITION AND SCOPE

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Section B - Implementation

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1/ 81 Wis. 2d 89 (1977).

2/ Sheboygan County Handicapped Children's Education Board (16843) 2/79.

3/ City of Wauwatosa (15917) 11/77; School District of Wisconsin Rapids (17877) 6/80.

7. The Board, or its representatives, shall meet, from time to time, with the representatives of the Federation, at the request of either party, to discuss matters of educational policy and development, as well as matters relating to the implementation of this Agreement." (Emphasis added)

The District argues that the underlined portion of the provision is non-mandatory on its face under the Racine School District case, since such language requires the District to discuss matters of educational policy with the Federation. The Federation asserts that it has a constitutional right to present its views on policy matters to the District, and therefore the language in issue relates to a mandatory subject of bargaining.

The fact that members of the Federation may have a constitutional right to express their views on policy matters does not establish a right to bargain thereon. The language in issue falls squarely within the non-mandatory definition set forth in the Racine School District case, since such language would require the District to discuss matters pertaining to educational policy.

"ARTICLE I RECOGNITION AND SCOPE

. . .

Section C - Employee Facilities

1. Existing teachers' lounges and restroom facilities shall be maintained, and furnished, subject to the physical limitations of the existing District buildings, and the lease agreements under which such buildings are held by the District.

2. Provisions for teachers' lounges and restroom facilities and teacher parking facilities, shall be developed in consultation with the Federation for all new school construction considered by the District.

3. The Board shall make available for each teacher a desk, office space, and related office equipment, subject to existing physical limitations of the District facilities."

The District contends that the foregoing provisions primarily relate to its ability to manage and control its own facilities and equipment, a subject over which it is not obligated to bargain. It asserts that the utilization and design of existing and planned school facilities could not be more directly related to the management and control of the school system, a non-mandatory subject of bargaining. The Federation argues that since the provisions relate to the health, safety and welfare of teachers, they are mandatory in nature. The Commission concludes that the providing of lounges and restroom facilities pertain primarily to working conditions, and therefore is a mandatory subject of bargaining. However, the Federation, in paragraphs 1 and 2 of the Article seeks to maintain existing facilities, not necessarily the number of same, and further it desires to participate in the development of same in future construction. Thus, as worded, said two paragraphs relate to the management and control of the District's physical facilities, and therefore pertain to non-mandatory subjects of bargaining.

With respect to paragraph 3 of Section C, it should be noted that the parties waived hearing in the matter and did not stipulate to any facts; therefore, the Commission is unable to determine whether the duties of the teachers involved are such that office space, desks and related equipment primarily pertain to working conditions or to the management of the District's facilities, and therefore we cannot determine whether said portion of the Section pertains to a mandatory subject of bargaining.

"ARTICLE III FAIR PRACTICES"

Section A

The Board shall not discriminate against any employee on the basis of race, creed, national origin, sex, age, marital status, political affiliation, or membership in or association with the activities of any employee organization.

Section B

The Board shall make certain that teacher application forms and oral interview procedures shall omit therefrom any reference to items listed in Section A above."

While the District did not take issue with regard to the bargainability of Section A, it contends that Section B relates to a non-mandatory subject of bargaining since the application thereof is not limited to instances where at least one bargaining unit member is applying for a position in the bargaining unit, citing City of Madison ^{4/} and Milwaukee Sewerage Commission. ^{5/} The Federation contends that the Commission erred in the foregoing cases and should recognize the interest which the Federation has in prohibiting discrimination against applicants for employment.

The parties do not dispute the question of whether Section A, prohibiting various forms of discrimination against employees, is a mandatory subject of bargaining. Their only dispute is over the alleged permissive nature of Section B which, unlike Section A, is not limited in its application to employees already represented by the Association and seeks to prohibit certain employer actions which are not in themselves discriminatory, and may in some instances be related to a legitimate employer interest. ^{6/}

We cannot accept the District's argument that this entire provision must be found to be non-mandatory simply because it is not limited in its application to situations where at least one bargaining unit member is an applicant for the position in question. This is so because, at least in the case of application forms, any applicant who is ultimately hired would then have a permanent record of such information in his file as an employee.

^{4/} (16590) 10/78.

^{5/} (17025) 5/79.

^{6/} For example, the requesting of information concerning race, creed, national origin, sex, age or marital status may have a legitimate relationship to governmental reporting requirements and any affirmative action program the District may have.

In determining whether this provision is a mandatory subject of bargaining it should be noted that the creation of such data may arguably have some impact on the working conditions of employees as well as its undisputable impact on the District's management function of conducting job interviews and constructing job applications. However, except in the case of the requesting of information concerning possible membership in or activity on behalf of labor organizations, 7/ we find that employees' interest in preventing the creation of such records because of their potential for misuse is far too remote and speculative when compared to the District's possible legitimate interest in creating a record of such information. Therefore, on balance we find that this provision, as it is currently worded, is not primarily related to wages, hours and working conditions.

"ARTICLE V GRIEVANCE PROCEDURE

Section A - Definitions

1. A grievance is a complaint by an employee of the bargaining unit, or by the Federation where:

(a) A policy or practice is alleged to be improper or unfair, or

(b) There has been an alleged deviation from, an alleged misinterpretation, or an alleged misapplication of a practice or a policy, or

(c) There has been an alleged unfair or inequitable treatment by reason of an act or condition contrary to existing policy or practice, or

(d) There has been an alleged violation, misinterpretation, or misapplication of any agreement existing between the parties hereto." (Emphasis added)

The District contends that, inasmuch as Article V, Section A does not limit the right to grieve policies which only primarily affect wages, hours or conditions of employment, or managerial policies, the impact of which affect wages, hours or conditions of employment, those portions of Section A relating to "policy" are a non-mandatory subject of bargaining. The Federation admits that the provision may allow the submission of permissive subjects to grievance arbitration process. It nevertheless argues that nothing in the Article permits the Federation to utilize the grievance procedure to create an impasse over permissive subjects, not a part of the collective bargaining agreement, and therefore the provision is both salutary and mandatory.

There is no question, and apparently the District agrees, that paragraph (d) of the above relates to a mandatory subject of bargaining. However, the remainder of Section A must be found to be non-mandatory. As worded, paragraphs (a) through (c), whether "policy" or "practice," is not limited to (1) policies or practices primarily related to wages, hours and/or conditions of employment (2) the impact which is primarily related to wages, hours and working conditions resulting from the District's administration of its policies or practices.

"ARTICLE VI CONDITIONS APPLICABLE TO TEACHING DUTIES

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Section E - Teaching Load (2)

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7/ While asking for such information may not be a per se violation of MERA (Kenosha Schools, Decision No. 6986-C, 2/66), it has a clear potential for misuse, and would not appear, on the record in this case, to be related to any legitimate management interest.

2. Definitions

(1) Student Contact Period - Fifty-three (53) minutes of instructional time devoted to instruction in the presence of the student."

The District argues that the determination of the length of a student contact period is primarily related to educational policy, and therefore the provision involved relates to a non-mandatory subject of bargaining. The Federation contends that the provision is merely definitional, and thus is distinguishable from the pupil contact hours proposal found to be permissive by the Commission in Oak Creek-Franklin Schools. 8/

It is clear to the Commission that the proposal involved herein relates to a non-mandatory subject of bargaining since it directly impacts on educational policy.

"ARTICLE VI CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

Section F - Academic Freedom and Responsibility

1. The policy of the District is to encourage the teaching, investigating and publishing of findings in an atmosphere of freedom and confidence.

2. This philosophy is based on the belief that when students have the opportunity to learn and acquire knowledge from a variety of sources and opinions in an atmosphere of honest and open inquiry, they will develop greater knowledge and maturity of judgment.

3. Therefore, the freedom of each teacher to present within his classroom the truth as he understands it in relation to his area of professional competence is essential to the purposes of our school and society and shall continue to be upheld by the Board and the administration.

4. When the teacher speaks or writes as a citizen, he shall be free from administrative and school censorship and discipline. However, the teacher has the responsibility to clarify the fact that he speaks as an individual and not in behalf of the school."

The District avers that it is clear that paragraphs 1 through 3 of the Article primarily relate to educational policy decisions regarding the methods by which its basic educational goals can best be achieved. It contends that paragraph 4, pertaining to the teacher as a private citizen, is completely and exclusively controlled by federal and state constitutional provisions, and therefore, since a teacher's constitutional rights cannot be modified or abridged via the collective bargaining process, the matter of constitutionally protected rights is a non-mandatory subject of bargaining.

The Federation argues that the issue as to whether a public employee may exercise his/her constitutional rights on the job would appear to be the "quintessence" of any employment condition, and thus is a mandatory subject of bargaining.

8/ (11827) 9/74.

There can be little doubt that the first three paragraphs of the Article relate to educational policy, and therefore we conclude that said paragraphs encompass non-mandatory subjects of bargaining. While paragraph 4 involves employee discipline, it seeks to protect rights of teachers as citizens, rather than the protection of rights of teachers as employees. Enforcement of constitutional rights of citizens are properly sought in the courts, rather than in forums established to resolve disputes relating to the enforcement of collective bargaining agreements. Since paragraph 4 only peripherally relates to working conditions (discipline), it, as written, relates to a non-mandatory subject of bargaining.

"ARTICLE VI CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

Section G - Clerical Assistance

Clerical assistance shall be provided for teachers to type tests, school business letters, prepare dittos, operate copy machines, prepare transparencies and other duties related to the instructional process. Requests for such assistance and the preparation of such documents, shall be made not less than one (1) full school day before such items are required, and completion shall be based on priority of request."

The District argues that the decision to hire and assign clerical aides is primarily related to its managements functions and thus is a non-mandatory subject of bargaining. The Federation asserts that the provision is mandatory under our decision in Oak Creek-Franklin, supra, wherein we stated:

"Typing and duplicating duties performed by teachers in carrying out their classroom responsibilities constitute a portion of their work load. We conclude that the nature of such work load has a minimal effect on educational policy, and, therefore, the matter whether teachers should perform typing and duplicating duties is subject to mandatory bargaining. However, the District has no mandatory duty to bargain on that portion of the proposal relating to the demand that the District employ and provide Clerical Aides in schools, since such a demand relates to the District's management function."

Contrary to the contention of the Federation, the Commission's determination in Oak Creek-Franklin supports the position of the District, rather than that of the Federation, since the provision involved would require the District to provide clerical personnel to perform the duties involved.

"ARTICLE VI CONDITIONS APPLICABLE TO TEACHING DUTIES

. . .

Section O - Discipline Policy

1. It shall be the duty and responsibility of each teacher to maintain proper class discipline. Every teacher shall have the right to dismiss from class any student causing serious disruption to classroom proceedings.

2. Any teacher dismissing a student from class for disciplinary purposes, shall immediately submit a written report of the incident and causes requiring such dismissal to his or her immediate supervisor. Before any student, dismissed from class by a teacher for disciplinary reasons, shall be permitted to return to such class, that student shall be counseled and effective administrative action shall be taken to prevent further classroom activities by said student before such student is permitted to return to the classroom."

The District argues that the provision does not concern matters of teacher safety, but rather how disruptive students are to be disciplined, counseled and administratively dealt with. It contends that such matters are directly related to educational policy decisions, which are permissive subjects of bargaining, as determined by the Commission in Beloit Schools. 9/ The Federation would agree that paragraph 2 of the provision is permissive under that rationale in said case, except for that portion which requires "effective administrative action" to prevent further disruption. It argues that paragraph 1 relates to a mandatory subject of bargaining for the reason that it only states that the teacher has the right--correlative to his or her duty and responsibility to maintain proper class discipline--"to dismiss from class any student causing serious disruption to classroom proceedings."

In Beloit Schools the Commission engaged in the following analysis, which was upheld by our Supreme Court:

"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."

Since the application of the disputed provisions is not limited to situations involving physical threats to teacher safety, it must be concluded that they are non-mandatory subjects of bargaining, for that reason alone, and therefore we see no reason to discuss any other aspects of the provisions involved.

"ARTICLE X RULES GOVERNING THIS AGREEMENT

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Section C - Staff Handbook

Any Professional Staff Handbook is considered not to apply to those rights, benefits, and responsibilities which are covered by this agreement between the Federation and the Board."

9/ (11831) 9/74; Modified Dane Co. Cir. Ct., 3/75 [Aff., as modified, 73 Wis. 2d 43, 1976].

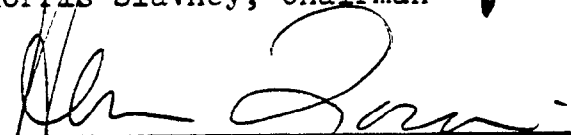
The District contends that the contents of a staff handbook, wherein it sets forth its ability to supervise its personnel and manage the District, does not relate to a mandatory subject of bargaining. The Federation asserts that the provision only requires that the handbook, as to matters covered in the collective bargaining agreement, does not apply, since the provision places no limitation upon the content thereof but merely precludes the District from contending that the handbook supersedes the terms of the collective bargaining agreement.

The provision is not a model of clarity. If the Federation intends that the provision merely provide that in any conflict between a policy handbook and the collective bargaining agreement provisions, the latter shall govern, the provision should so state. As worded, the provision may be subject to various interpretations, and therefore, we decline to resolve the issue presented with respect thereto.

Dated at Madison, Wisconsin, this 29th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner