STATE OF WISCONSIN | BRANCH 1 CIRCUIT COURT | ROCK COUNTY

BLACKHAWK TEACHERS' FEDERATION
LOCAL 2308, WFT, AFT, AFL-CIO,

Petitioners,

-vs-

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

MEMORANDUM DECISION

Case #80-CVA-2009

Decision No. 16640-A

NATURE OF DECISION

This proceeding was commenced by the petitioner to review a declaratory ruling of the Wisconsin Employment Relations Commission. Blackhawk Vocational, Technical and Adult Education District petitioned the Commission consistent with the provisions of sec. 111.70(4)(b) and (cm)6g, Stats., for a determination of whether certain provisions contained in its 1976-1978 collective bargaining agreement with Blackhawk Teachers' Federation Local 2308 were mandatory or non-mandatory subjects of bargaining within the meaning of the Municipal Employment Relations Act. (Sec. 111.70, Stats.) The Commission ruled that one provision of the agreement was a mandatory subject of bargaining, that eight provisions were non-mandatory subjects of bargaining, and that it could not rule as to two provisions because of an inadequate factual basis and ambiguous language.

This matter has been submitted on briefs only without benefit of oral argument. Briefs have been submitted by the petitioners, the respondent, intervenor, Blackhawk Vocational, Technical and Adult Education District, and the Wisconsin Education Association Council, with permission of the Court, has filed an amicus brief.

FACTS

The District (hereinafter intervenor) and the Teachers' association (hereinafter petitioner) were parties to a collective bargaining agreement effective July 1, 1976, through June 30, 1978. During negotiations for a successor agreement, it was the position of the intervenor that certain provisions of the 1976-1978 agreement were not mandatory subjects of bargaining and, as a result, the intervenor had no duty to bargain collectively with the petitioner relative to such subjects.

Thereafter, on May 4, 1978, the petitioner petitioned the Wisconsin Employment Relations Commission to commence mediation-arbitration. Subsequently, an agreement was reached as to the provisions to be included in a successor agreement, with the exception of the contractual provisions contended by the intervenor to be non-mandatory.

Thereafter, on September 5, 1978, the intervenor petitioned the Commission for a declaratory ruling whether the challenged contractual provisions were mandatory or non-mandatory subjects of bargaining under the Municipal Employment Relations Act. The Commission's ruling was issued on September 19, 1980. This proceeding was commenced October 23, 1980, for review of the Commission's declaratory ruling.

The ruling of the Commission as to each of the challenged provisions of the agreement will be set forth in the discussion portion of this decision.

ISSUE

Whether the clauses of the agreement relating to academic freedom and responsibility, student contact period, grievances of policies and practices, meetings on educational policy and development, teacher's application and interview procedures, student discipline policy, staff handbook, and clerical assistance are mandatory or non-mandatory subjects of bargaining.

Petitioner contends that all of the above-mentioned clauses in the agreement are subjects of mandatory bargaining.

Respondent and intervenor argue that all of the clauses in dispute are non-mandatory subjects of bargaining.

The Wisconsin Education Association Council, in its amicus brief, urges this Court to hold that five of the eight clauses are mandatory subjects of bargaining. Amicus concedes that a portion of one of the disputed provisions is a non-mandatory subject of bargaining. The amicus brief, however, supports the position of the petitioner that the Commission's rulings with regard to all of the disputed clauses should be reversed and this court should hold that such provisions constitute mandatory subjects of bargaining.

DISCUSSION

STANDARD OF REVIEW

In Beloit Education Asso. v. WERC, 73 Wis. 2d 43 (1976) the court discussed the standard of review applicable to the Beloit case. The court noted, "It is certainly true, as the trial court observed, that the general rule in this stats 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.' However, as this court has made clear, the rule that great weight is to be given and any rational basis will sustain the practical interpretation of the agency charged with enforcement of a statute '...does not apply unless the administrative practice is long-continued, substantially uniform and without challenge by governmental authorities and courts.' In this petition ... we have very nearly questions of first impression raised concerning the areas of mandatory bargaining between a school board and a teachers' association under sec. 111.70(1)(d). Given this situation, we would hold quoting a very recent case, that '...this court is not bound by the interpretation given to a statute by an administrative agency. Nevertheless, that interpretation has great bearing on the determination as to what the appropriate construction should be.' It is such 'great bearing' or 'due weight' standard, not the 'any rational basis' test, that we find here applicable."

Intervenor points out in its brief that the Beloit case was decided in 1976, the issues now before the Court are not matters of first impression, and the Commission has had considerable experience in this area in the five years since Beloit. Intervenor suggests that the ruling of the respondent is entitled to great weight because of the expertise of the respondent, its experience since Beloit, and its specialized knowledge. Respondent also argues that the "any rational basis" test is appropriate.

Intervenor argues that under any test adopted by this Court the ruling of the commission must be affirmed.

In reviewing the ruling of the respondent, this Court will adopt the "great bearing" or "due weight" standard used by our Supreme Court in Beloit and Unified S.D. No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977).

Despite the application of the lower standard, however, as pointed out by our Supreme Court in the Beloit case at page 68, the interpretation of the respondent has great bearing on the determination as to what the appropriate construction should be.

LEGAL STANDARD FOR DETERMINING MANDATORY-PERMISSIVE SUBJECTS OF BARGAINING

In Beloit, our court affirmed the respondent's interpretation of sec. 111.70 (1)(d), Stats. In doing so, bargaining was mandated as to, (1) matters which are primarily related to wages, hours and conditions of employment, and, (2) the impact of the establishment of educational policy affecting the wages, hours and conditions of employment.

The legal standard for determining mandatory and permissive subjects of bargaining has not been reversed or modified by our court. Therefore, this Court must apply the legal standard adopted by the Supreme Court in Beloit.

The "primary relation" test adopted by our court in Beloit mandates bargaining on subjects primarily related to wages, hours or conditions of employment. Bargaining is not required with regard to matters primarily related to management and direction of a governmental unit.

The "primarily so" test is a difficult one to apply. Virtually all policy decisions of a school board have some impact on either wages, hours or conditions of employment. For example, a school board decision because of monetary considerations to postpone redecorating of classrooms and hallways has some impact on conditions of employment. A bright, clean classroom atmosphere tends to stimulate enthusiasm and provides a pleasant, working atmosphere. Clearly, however, such a decision on the part of the board is primarily or essentially a management decision and not an appropriate subject for bargaining. The impact on the teachers' working conditions is insignificant as compared to the school board's obligation to the electorate to be fiscally responsible.

On the other hand, a board decision because of fiscal problems to lay off teachers which, as a result, would require an increase in classroom size, may have a significant impact on working conditions. In this hypothetical, although the layoff decision is a policy matter reserved to the school board, the impact of that decision is a mandatory subject of bargaining.

Since there are no across-the-board broad, sweeping rules, the Court will now examine each of the contested clauses in the bargaining agreement for a determination of whether such clauses are mandatory or non-mandatory subjects of bargaining.

The clauses will be discussed in the order in which they appear in the petitioner's and intervenor's briefs.

ACADEMIC FREEDOM AND RESPONSIBILITY

The Commission ruled that the following provisions of the contract were permissive subjects of bargaining:

> "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."

In ruling on these provisions of the contract, the Commission said that there can be little doubt that the first three paragraphs relate to educational policy and, therefore, are non-mandatory subjects of bargaining. Concerning paragraph 4, the Commission reasoned, "While paragraph 4 involves employee discipline, it seeks to protect the rights of teachers as citizens, rather than the protection of the 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."

In the view of the Court, the first three paragraphs of this disputed clause obviously relate to educational policy and, therefore, bargaining is not mandated.

These paragraphs encourage the teaching staff to be innovative, encourage lively discussion on matters on which there may be differences of opinion or philosophy, and give to the teaching staff a right to express their views in such areas.

The first three paragraphs of this disputed clause place no duty whatever upon the teachers to innovate, encourage discussion or express their personal opinions.

Contrary to petitioner's argument, the first three paragraphs are not in any way related to teacher discipline.

The Court is also of the opinion that the respondent was correct in ruling that paragraph 4 of this disputed provision as written relates to a non-mandatory subject of bargaining.

Paragraph 4 protects a teacher when speaking as a citizen and not a member of the teaching staff. Although the Commission determined that paragraph 4 peripherally relates to discipline, I do not agree with that conclusion. Paragraph 4 gives teachers the right as members of the public to speak out on matters of public interest. It imposes absolutely no duty on teachers to be active or vocal in community affairs. Paragraph 4 imposes on a teacher only the responsibility of clarifying that he speaks as an individual and not for the school when he speaks or writes as a citizen.

Petitioner and amicus argue in their briefs that the exercise of First Amendment rights by teachers are the quintessence of any employment agreement and, thus, are subjects of mandatory bargaining.

It appears to this Court that rather than diminish First Amendment rights, the four paragraphs in question assure teachers that their First Amendment rights will not be abridged. Petitioner argues that because First Amendment rights could be violated, such rights are mandatory subjects of bargaining.

This Court agrees with the respondent that the bargaining table is an inappropriate place to argue First Amendment privileges.

Constitutional lawyers are not in agreement as to specific activity protected by the First Amendment. Members the United States Supreme Court in numerous cases have disagreed as to First Amendment protection. Appellate court decisions from the various states on similar facts and circumstances have come to opposite conclusions. In the view of the Court, it is the role of the judiciary to determine the scope of First Amendment protection. Teachers, school boards and arbitrators are, in the opinion of this court, except perhaps in the clearest of cases, not competent to resolve First Amendment disputes.

Giving the respondent's ruling relating to academic freedom and responsibility due weight, the ruling of the Commission, for reasons stated above, is affirmed.

STUDENT CONTACT PERIOD

The Commission ruled that the following provision of the contract was a permissive subject of bargaining:

> "Fifty-three minutes of instructional time devoted to instruction in the presence the student."

In arguing that the student contact period provision of the agreement is a mandatory subject of bargaining, petitioner points out that the respondent has recognized that teachers have a right to negotiate over the number of days they must teach, the number of days they may attend conventions or in-service programs. Petitioner says at page 21 of its brief "...What is true for days is also true for hours."

Petitioner also asserts that the student contact period mandates bargaining to allow sufficient time between classes to lessen physical and mental strain and to permit teachers "to catch their breath and to relax a moment between classes." Petitioner contends that the clause on instructional time is equivalent to provisions for coffee breaks in private industry which are mandatory subjects of bargaining.

As pointed out in the brief of the intervenor, the student contact clause does not refer to rest periods or breaks for teachers. Additionally, it is not clear as the petitioner asserts that the purpose of this clause is to allow a seven-minute break for teachers between classes. The provision is not relevant to the number of hours teachers must work daily.

In 1974 in Oak Creek-Franklin Joint City School District #1, Decision No. 11827-D, the Commission determined that student-teacher contact time and teacher preparation were permissive subjects of bargaining. In so doing, the Commission stated in part as follows: "Such decisions directly articulate the District's determination of how quality education may be obtained and whether to pursue same. However, the impact thereof, also as in the 'class size' issue, have direct affects on a teacher's working conditions, and, therefore, the impact thereof is subject to mandatory bargaining."

In Beloit, the Supreme Court determined that classroom size was a matter of basic educational policy to be determined by the Board and not a mandatory subject of bargaining. In so doing, the Court approved the trial court's rationale that the making of educational policy includes the power to decide that class size has an affect on the quality of education.

The same rationale is applicable to student contact time.

This Court is satisfied that student contact time is a matter of basic educational policy reserved to the Board and not a mandatory subject to bargaining. The Court is further satisfied that the impact of the policy on wages, hours, and conditions of employment is a mandatory subject of bargaining.

Giving the respondent's ruling relating to student contact period due weight, the ruling of the Commission for reasons stated above is affirmed.

GRIEVANCES OF POLICIES AND PRACTICES

The Commission ruled that the following provisions of the contract were permissive subjects of bargaining:

> "A grievance is a complaint by an employee of the bargaining unit, or by the Federation where:
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> (a) A policy or practice is alleged to be improper or unfair, or
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> (b) There has been an alleged deviation from, an alleged misrepresentation, 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..."

In determining that Sections (a), (b), and (c) were permissive subjects of bargaining, the Commission said, "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."

In arguing that (a) through (c) are mandatory subjects of bargaining, petitioner asserts that the holding of the Commission is contrary to the Supreme Court's holding in Beloit. However, as pointed out by the respondent and the intervenor in their brief, the ruling of the Commission is consistent with the Beloit decision. At page 52, footnote 8, in Beloit the Court said, "To say that curriculum content is not a proper subject of bargaining does not mean that teachers have no legitimate interest in that subject or that they should not participate in curriculum decisions. It means only that the bargaining table is the wrong forum and the collective agreement is the wrong instrument...." No organization should purport to act as an exclusive representative; the discussions should not be closed; and the decision should not be bargained for or solidified as an agreement. In addition, all of the ordinary political processes should remain open for individuals or groups of teachers to make their views known to the politically responsible officials and thus to influence the decision." In addition, concerning the teachers' association and its legitimate interest in policy decisions, the Court said, "The teachers' association here is a

collective bargaining agent under the statute, and also a professional association of teachers concerned with matters of school system management and educational policy. As such bargaining agent, the association can collectively bargain with the Board as to matters of 'wages, hours and conditions of employment.' As a professional association it may also be heard as to matters of school and educational policies, but it makes such contribution or input along with other groups and individuals similarly concerned." (Emphasis supplied.)

Further, as pointed out by the intervenor, "Petitioner's assertion that nothing in the grievance procedure would permit questions of educational policy to be submitted to arbitration conflicts with the clear language permitting employees to grieve 'policies and practices'. The provision later in the grievance procedure that an arbitrator cannot amend any provision of the agreement provides no protection against an arbitrator passing judgment on, and possibly rewriting a policy outside the agreement."

The Court is satisfied that paragraphs (a) through (c) are not mandatory subjects of bargaining.

Giving the respondent's ruling relating to grievances of policies and practices due weight, the ruling of the Commission, for reasons stated above, is affirmed.

TEACHER APPLICATION AND INTERVIEW PROCEDURES

The Commission ruled that Section B of the following provisions of the contract was a permissive subject of bargaining:

"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.'"

Concerning this contractual provision, the respondent agrees that Section A mandates bargaining.

In this respect, Section B is not limited to employees represented by the petitioner. In commenting on Section B, the Commission said, "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."

In rejecting the argument of the intervenor that the entire provision is non-mandatory because it is not limited in its application to situations where at least one member of the bargaining unit is an applicant for the position in question, the Commission said, "We cannot accept the District's argument that this entire provision must 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 application

Section B relates to what may not be included on application forms or as part of the interview process. In its brief, intervenor points out, "If this is found to be a mandatory subject of bargaining, a union could negotiate all aspects of the hiring process, such as who will be present, what questions may be asked, etc." Amicus, in its brief, argues that such contention on the part of the intervenor is so illogical as to not require comment. Amicus further contends that the Commission rejected that line of reasoning.

This Court, after reading the Commission's memorandum, finds no language indicating that the Commission rejected this contention or, for that matter, that it was argued before the Commission. Further, in the judgment of this Court, the reasoning is sound.

In a footnote to the memorandum, the respondent points out that certain information on application forms relating to race, creed, national origin, sex, age, or marital status may have a legitimate relationship to governmental reporting requirements and affirmative action programs.

This Court agrees with the position of the respondent that the petitioner's interest in preventing the creation of records because of their potential for misuse is too remote and speculative as compared to the District's possible legitimate interest in creating that information. Section B is not, in the judgment of the Court, primarily related to wages, hours, and working conditions.

Giving the respondent's ruling relating to teacher application and interview procedures due weight, the ruling of the Commission, for reasons stated above, is affirmed.

STUDENT DISCIPLINE POLICY

The Commission ruled that the following provisions of the contract were permissive subjects of bargaining:

> "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 prooceedings.
>
> 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."

Petitioner asserts that the record does not show whether the School Board requires teachers to maintain their classrooms without serious disruption, and, therefore, from the record it cannot be determined whether the contractual provisions relating to student discipline policy are mandatory or permissive. Petitioner argues that the finding of the respondent that these provisions are permissive should be set aside; however, this Court should not determine that the provisions are mandatory.

In Beloit, the respondent ruled that misbehavior of students that presents a physical threat to teachers' safety was mandatorily bargainable; whereas, misbehavior not involving threats to physical safety of teachers was a permissive subject of bargaining. The respondent's ruling was affirmed by the Supreme Court on appeal.

In the judgment of the Court, these provisions of the agreement relating to student discipline policy are policy matters and only remotely related to conditions of employment. As a result, they are not mandatorily bargainable.

Giving the respondent's ruling relating to student discipline policy due weight and as a result of the Beloit precedent, the ruling of the Commission is affirmed.

STAFF'S HANDBOOK

The Commission determined that the following provision of the contract relating to staff handbook was ambiguous and, therefore, declined to rule whether the provision was a permissive or mandatory subject of bargaining.

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

In declining to resolve this issue, the Commission stated, "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 state. As worded, the provision may be subject to various interpretations, and, therefore, we decline to resolve the issue presented with respect thereto."

Based on the Beloit precedent, the intervenor urges this Court to find that the provision of the agreement relating to staff handbook is a permissive subject of bargaining. The intervenor contends that the provision relates to the ability of the Board to supervise its personnel and manage the District and, therefore, is non-bargainable. The petitioner contends that this clause mandates bargaining. At page 31 of its brief, petitioner states, "The provision does not prevent the Handbook from dealing with matters covered by the collective agreement: the provision places no limitation on the content of the Handbook. It does, however, make the Handbook inapplicable to matters that the parties have collectively agreed to. The provision thus simply precludes the Board from arguing that its Handbook supercedes what it has been collectively agreed upon. No more mandatory a subject of bargaining can be imagined."

This Court agrees with the respondent that the ambiguous character of the provision precludes a rational determination of whether the provision is a mandatory or permissive subject of bargaining. If the provision means only that nothing contained in the handbook supercedes the collective bargaining agreement, the provision is meaningless since obviously the intervenor could not unilaterally amend or modify the provisions of its agreement with the petitioner. If this provision is interpreted as leaving to the Board the ability to unilaterally establish practices and procedures which primarily affect wages, hours or conditions of employment, the staff handbook provision would be a mandatory subject of bargaining. In any event, the impact of any provision of the staff handbook on wages, hours or conditions of employment is mandatorily bargainable.

Giving the respondent's ruling due weight, and because of the ambiguous nature of this contractual provision, the ruling of the Commission is affirmed.

CLERICAL ASSISTANCE

The Commission ruled that the following provision of the contract was a permissive subject of bargaining.

> "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."

In determining that the clerical assistance provision of the agreement was a permissive subject of bargaining, the respondent relied on its ruling in Oak Creek-Franklin Joint City School District No. 1, Decision No. 11827-D (9/74). In the view of this Court, the respondent correctly ruled that this provision of the agreement is a permissive subject of bargaining.

As pointed out by the intervenor, a determination of how much staff is required to do what work is a basic management function. The impact of the management decision on wages, hours or conditions of employment is a mandatory subject of bargaining. However, the management determination relating to the numbers and kinds of clerical help is not a mandatory subject of bargaining.

Giving the respondent's ruling due weight, its ruling with respect to clerical assistance is affirmed.

SUMMARY

This Court is satisfied that under either the rational basis or due weight tests the rulings of the respondent which are challenged must be affirmed.

Counsel for the respondent is directed to draft an appropriate order for execution by the Court.

Dated at Janesville, Wisconsin,
this 10 day of August, 1981.

BY THE COURT:

Gerald W. Jaeckle /s/
Gerald W. Jaeckle, Judge
Circuit Court, Branch 3