

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case II  
No. 23569 DR(M)-101  
Decision No. 16843

Hopp, Hodson & Powell, Attorneys at Law, by Mr. Alexander Hopp,  
appearing on behalf of the Petitioner.  
Habush, Gillick, Habush, Davis & Murphy, S.C., Attorneys at Law,  
by Mr. John S. Williamson, Jr. appearing on behalf of the  
Respondent.

The above-named Board having filed (on September 26, 1978) and amended (on November 10, 1978) a petition requesting Commission issuance of a declaratory ruling pursuant to Section 111.70(4)(cm)6.g., Stats., regarding whether two proposals submitted during collective bargaining by and with the above Union are mandatory subjects of bargaining; and the parties having waived hearing and briefed the matter as of December 4, 1978; and the Commission having considered the record 1/ and briefs, and being fully advised in the premises, makes and issues the following

1. Sheboygan County Handicapped Children's Education Board, hereinafter referred to as the Board, is a municipal employer. The Board operates a school and also provides teaching services to various school districts in Sheboygan County.

2. Lightfoot Federation of Teachers, Local 3554, WFT, AFT, AFL-CIO, hereinafter referred to as the Union, is a labor organization and the exclusive representative of a bargaining unit of Board employees consisting of "all full-time and regular part-time classroom teachers, itinerant teachers, and special teachers."

3. The office and teaching areas constituting the workplaces of the Board employees represented by the Union are located, in part,

1/ The Commission has taken official notice of the contents of the parties' proposed final offers contained in the med-arb file in Case I.

on premises controlled by the Board, and, in part, on various school districts' premises not controlled by the Board.

4. The Board timely objected to inclusion of two proposals in the Union's proposed final offer exchanged during a WERC investigation of the Union's Section 111.70(4)(cm)6, Stats., petition for mediation-arbitration to resolve the parties' dispute as to the terms of a new collective bargaining agreement to succeed the parties August 31, 1977-August 31, 1978 agreement. After the Board filed the instant petition for a declaratory ruling concerning the objected-to proposals, the Union modified one of them, and the Board amended its declaratory ruling petition, substituting the Union's modified language. Following that modification, the two proposals at issue herein read as follows:

- a. Office and Teaching Conditions - Article 11. Any area used by teachers for office space and/or teaching shall have adequate floor space and shall be adequately furnished, cleaned, lighted, ventilated and heated so as to maintain the health, safety and welfare of the teacher.
- b. Professional Opportunities - Article 18, paragraph B. Teachers interested in filling such vacancies, which occur during the school year, shall so advise the Administrator in writing within ten (10) days. Requests shall be granted on the basis of qualification (e.g. training, relevant experience, certification and the like), and seniority.

5. The Union proposal entitled "Office and Teaching Conditions", above, as written and in the instant employment context, primarily relates to the formulation and management of public policy.

6. The Union proposal entitled "Professional Opportunities", above, is primarily related to wages, hours and conditions of employment of Board employees represented by the Union.

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

#### CONCLUSIONS OF LAW

1. The above Union proposal entitled "Office and Teaching Conditions", as written and in the instant employment context, is a permissive subject of bargaining within the meaning of Section 111.70(4)(cm)6.a., Stats. and the Municipal Employment Relations Act.

2. The above Union proposal entitled "Professional Opportunities" is a mandatory subject of bargaining within the meaning of Section 111.70(4)(cm)6.a., Stats. and the Municipal Employment Relations Act.

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

#### DECLARATORY RULING

1. The Board does not have a duty to bargain collectively within the meaning of Section 111.70(3)(a)4 and (1)(d), Stats., with the Union with respect to the Union proposal entitled "Office and Teaching Conditions" as that proposal is written in the instant employment context; and, in view of the Board's objection, the Union

cannot include said proposal in its final offer for purposes of mediation-arbitration pursuant to Section 111.70(4)(cm), Stats.

2. The Board has a duty to bargain collectively within the meaning of Sections 111.70(3)(a)4 and (1)(d), Stats., with the Union with respect to the Union proposal entitled "Professional Opportunities", and the Union is entitled to include said proposal in its final offer for purposes of mediation-arbitration pursuant to Section 111.70(4)(cm), Stats.

Given under our hands and seal at the  
City of Madison, Wisconsin this 19th  
day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Herman Torosian  
Herman Torosian, Commissioner

Marshall L. Gratz  
Marshall L. Gratz, Commissioner

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

The Board petitions us for a declaratory ruling that two proposals contained in the Union's last-submitted proposed final offer, an amended, constitute nonmandatory subjects of bargaining. The Union, contrary to the Board urges that the Beloit Schools 2/ and Racine Schools 3/ tests for mandatory/permissive must be modified as a consequence of the intervening passage of Ch. 178, Laws of 1978. The Union also contends that under either standard the proposals at issue are mandatory subjects of bargaining.

Regarding the proper decisional standard to be applied, the Union argues that Ch. 178 transformed collective bargaining in the units affected from one based on economic power to a political process with increased public control and participation culminating in a political decision by an agent of the state in accordance with standards established by the Legislature. That transformation, the Union argues, should relieve the "concern for the integrity of political processes" that the Supreme Court identified as "the principal limit on the scope of collective bargaining," such that the Beloit and Racine Schools formulations are no longer either binding or persuasive precedent. Instead, the Union urges that the proper mode of analysis should be to ". . . first determine whether the subject significantly affects wages, hours and working conditions; [and] if it does, then . . . determine whether the persons selected to be mediator-arbitrators, treated as a class, are qualified to resolve a type of dispute that the subject generates . . . ."

Notwithstanding the Union's contentions, we are persuaded that the Legislature intended to effect no change in the scope of collective bargaining by its enactment of Ch. 178. For, it used the same terminology in Section 111.70(4)(cm)6, Stats., to describe the subject matter of disputes susceptible to compulsory mediation-arbitration as it did in the pre-existing general definition of "collective bargaining" 4/ and references defining the scope of municipal interest arbitration under Section 111.77. 5/ In each case, the Legislature defined the subject matter as "wages, hours and conditions of employment." We conclude that, since it used the same terminology, the Legislature intended no change in the existing analytical framework for determining the mandatory/nonmandatory nature of a proposal or subject of bargaining.

Therefore, the legal standard we shall apply herein is as stated in the Racine Schools case:

---

2/ Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976).

3/ Unified School District of Racine v. WERC, 81 Wis. 2d 89 (1978), hereinafter "Racine Schools".

4/ Section 111.70(1)(d), Stats.

5/ Sections 111.77(4)(a), (6)(d) and (6)(h), Stats.

. . . 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. This test can only be applied on a case-by-case basis, and is not susceptible to 'board and sweeping rules that are to apply across the board to all situations . . . . [citations omitted]. 6/

#### "Professional Opportunities" Proposal

The disputed proposal reads as follows:

Teachers interested in filling such vacancies, which occur during the school year, shall advise the administrator in writing within ten (10) days. Requests shall be granted on the basis of qualification (e.g. training, relevant experience, certification and the like), and seniority.

The Board, in its brief, concedes that "This item concerns assignment of teachers to certain teaching areas." However, the Board argues that "Where teacher skills are to be utilized is clearly the 'management and direction' of the governmental unit." The Union, on the other hand, argues that a proposal establishing the criteria for "transfers" and seeking inclusion of seniority among them is clearly a mandatory subject of bargaining.

Since there appears to be no question that the "vacancies" referred to in the proposal are assignments of bargaining unit work, and since there is no contention either that the proposal would require the Board to assign individuals lacking legally required certification to perform such assignments, or to apply contractually established qualifications for initial hirings, we are satisfied that the instant proposal is a mandatory subject of bargaining. While the proposal would control the Board's selection as among various individuals for transfer or promotion within the bargaining unit, we have stated that such a proposal is a mandatory subject where, as here, it relates only to situations in which at least one employee-applicant within the bargaining unit is seeking the promotion or transfer. 7/

#### "Office and Teaching Conditions" Proposal

During the processing of the Board's declaratory ruling petition, the Union modified its proposal on this subject. In its previous form, the Union's proposal read as follows:

##### 6. Office and Teaching Conditions - Article 11

A joint committee made up of two (2) Union and two (2) Board representatives shall be formed to investi-

---

6/ Racine Schools, above, note 3, 89 Wis. 2d at 102.

7/ City of Madison (16590) 10/78, however, if the proposal, on its face, purports to govern selections as between two applicants outside the unit where no comparison with a unit employee is involved, the proposal would be nonmandatory to that extent. Id.

gate and report on office and teaching conditions in the Districts serviced by the SCHCEB.

The Committee shall visit each outlying school site and examine the work and office areas of each teacher employed by the SCHCEB. Each site visited shall be included in the report and contain observations on space, location, lighting, furnishings, and ventilation.

A written report shall be completed and submitted to the Union and Board by January 15, 1979. Recommendations for improvement shall be included in the report.

After the Board objected to said proposal as being nonmandatory, the Union amended the proposal to read as follows:

Office and Teaching Conditions - Article 11

Any area used by teachers for office space and/or teaching shall have adequate floor space and shall be adequately furnished, cleaned, lighted, ventilated, and heated so as to maintain the health, safety and welfare of the teacher.

The timeliness of the Union's modification is not disputed, but the Board has amended its petition to contend, inter alia, that the amended proposal relates to a permissive subject of bargaining.

The Union argues that the proposal ". . . essentially makes it possible for the Union to enforce the requirements of Section 101.11, Wis. Stats.", 8/ through the contractual grievance procedure and

---

8/ Section 101.11 Stats., reads as follows:

101.11 Employer's duty to furnish safe employment and place. (1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

(2) (a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

" . . . if it goes beyond the statutory requirements, has only a slight impact on the [Municipal Employer]."

The Board argues that ". . . state and municipal building and health regulations . . . [are] . . . sufficient to maintain the health safety and welfare of the teachers . . . ." The Board further contends that "Any use of or order by the Board concerning the premises of the school buildings which is not in contravention of state and municipal building regulations, etc., is based upon a managerial prerogative and is hence not a mandatorily bargainable issue."

On its face, the instant proposal focuses upon office and teaching area floor space, furnishings, cleanliness, lighting and heating only as regards their adequacy to maintain the health, safety and welfare of the teacher working therein. The adequacy of such premises for students, administrators and others is not addressed. Therefore, in employment contexts wherein the Board has exclusive control over the workplace, a Racine Schools analysis of the mandatory/permissive nature of the instant proposal would pit the above concerns--which track closely with the safe place statute, Section 101.11, Stats., and which seem central to the teachers' physical well-being and comfort--against the possible need for municipal employer expenditures of funds to bring particular workplaces into compliance with the proposed standard. In an employment context involving only workplaces under the control of a given municipal employer, we might well resolve that balance by concluding that the proposal primarily relates to wages, hours and conditions of employment.

Here, however, some of the bargaining unit employees' workplaces are owned and controlled by various school districts and not by the Board. Since the proposal is couched in terms of an unqualified obligation rather than, e.g., in terms of a reasonable effort to cause the workplace to be brought into compliance, the Board's only certain means of remedying an alleged noncompliance with the proposed standard would be to withdraw its services from the school district unless and until that district were to bring its premises into compliance. Thus, the remedy would not rest simply upon the Board's determination of whether to expend renovation funds, but would extend to a determination of whether and to what extent a particular school district will be served at all. Since the public policy dimensions of the latter determination go to the very level and scope of services to be provided by the Board, they are far more fundamental and significant than the public policy dimensions involved where all workplaces are controlled by a given municipal employer. A new Racine Schools comparison must therefore be made.

---

8/ (continued)

(b) No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, no fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees or frequenters.

In striking that new balance, we conclude that determinations of whether and to what extent a particular school district will be served by the Board is so closely tied to public policy formulation that to overcome it a proposal concerning floor space, furnishings, cleanliness, lighting and heating of workplaces would need to be drawn in a manner clearly relating only to the most central of employee concerns about workplace conditions such as freedom from actual dangers to health and safety. The instant proposal sweeps broadly beyond those core employee concerns, for example, by referring to "welfare", which, in the Section 101.11, Stats., context referred to by the Union, includes considerations of employee "comfort." 9/

Therefore, since the instant proposal would apply, inter alia, to the workplaces outside the Board's direct control, and since it imposes an unqualified obligation to maintain the proposed standard for any office or teaching area used, we conclude that, as written, it primarily relates to the formulation or management of public policy and is a permissive subject of bargaining.

Dated at Madison, Wisconsin this 19th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

Herman Torosian  
Herman Torosian, Commissioner

Marshall L. Gratz  
Marshall L. Gratz, Commissioner

---

9/ Section 101.01, Stats. defines "welfare" as including "comfort" for purposes, inter alia, of construing Section 101.11, Stats.