

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

SCHOOL DISTRICT OF WEST ALLIS-
WEST MILWAUKEE, ET AL.

Requesting a Declaratory Ruling
Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute
Between Said Petitioner and

WEST ALLIS-WEST MILWAUKEE EDUCATION
ASSOCIATION

Case XXX

No. 24133 DR(M)-115

Decision No. 17091

Appearances:

Foley & Lerner, Attorneys at Law, by Mr. Herbert P. Wiedemann,
appearing on behalf of the District.

Perry, First & Reiher, S.C., Attorneys at Law, by Mr. Richard
Perry, appearing on behalf of the Association.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECLARATORY RULING

School District of West Allis-West Milwaukee, et al., hereinafter referred to as the District, on February 6, 1979 filed a petition for a declaratory ruling pursuant to Section 111.70(4)(b), Wisconsin Statutes. On February 23, 1979 West Allis-West Milwaukee Education Association, hereinafter referred to as the Association, filed a Statement in Response to Petition and Motion to Quash and/or Dismiss said petition. A hearing was held before Examiner George R. Fleischli at Milwaukee, Wisconsin on April 9, 1979 wherein the parties stipulated to the relevant facts for purposes of ruling on certain issues raised by the petition and motion. The parties filed briefs which were exchanged on May 10, 1979 and neither party elected to file a reply brief which was due to be mailed on May 21, 1979. Based on the record thus presented the Commission makes and enters the following.

FINDINGS OF FACT

1. The District is a unified school district, as that term is defined in the Wisconsin Statutes, and a Municipal Employer within the meaning of Section 111.70(1)(a), Wis. Stats. The operation of the District is financed principally by State and local financing but the District accepts some federal funds and approximately one-half of one percent of its total revenue is currently derived from federal funds.

2. The Association is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats., and the representative of approximately 700 employees of the District in a collective bargaining unit consisting of

All regular certified teachers (including helping and reading teachers, special education teachers, physical and occupational therapists, and teachers on leaves of absence), psychologists, social workers and counselors, and guidance counselors, excluding substitute teachers, recreation supervisors, vice-principals, principals, supervisors, elementary consultant, director of instruction, director of business services, superintendent of schools and all other employees and administrators.

3. The District and Association are currently engaged in collective bargaining over the terms and conditions of employment to be included in a new collective bargaining agreement. During the negotiations a dispute has arisen concerning an economic proposal made by the Association which the District alleges is in excess of the pay standards established by the United States Council on Wage and Price Stability. 1/ On February 6, 1979 the District filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling, pursuant to Section 111.70(4)(b), Wis. Stats., to determine whether an economic proposal made by the Association in bargaining, which proposal is in excess of said pay standard is a prohibited subject of bargaining or, in the alternative, a permissive subject of bargaining. On February 23, 1979 the Association filed a Statement in Response to Petition and Motion to Quash and/or Dismiss, wherein it contends that the District is seeking a ruling that would convert a voluntary federal program into a mandatory state legal requirement and the Association urges the Commission to dismiss the petition on the grounds that: (1) the Commission is without authority to grant the requested ruling; and (2) the petition presents no genuine issue of fact or law.

4. At the time of the hearing herein the Association agreed that for purposes of ruling on its Motion to Dismiss, the Commission may assume that its proposals on wages are in excess of the pay standard. Further, the parties stipulated that the petition, and response thereto, and arguments of the parties raised the following two issues: 2/

- (1) Does the pay standard of the United States Council on Wage and Price Stability apply to the District; and
- (2) Is an economic proposal in excess of the pay standard of the United States Council on Wage and Price Stability a mandatory subject of bargaining?

The District takes the position that the pay standard applies to the District and that a proposal in excess of the pay standard is a prohibited, or in the alternative, a permissive subject of bargaining. The Association takes the position that the pay standard does not apply to the District and that a proposal in excess of the pay standard is a mandatory subject of bargaining.

Based on the above and foregoing Findings of Fact, the Commission makes and enters the following

CONCLUSIONS OF LAW

1. The pay standard of the United States Council on Wage and Price Stability set out at 6 Code of Federal Regulations 705B is applicable to the District.

2. An economic proposal which exceeds the pay standard of the United States Council on Wage and Price Stability set out at 6 Code of Federal Regulations 705B is a mandatory subject of bargaining.

1/ 6 Code of Federal Regulations 705 (Appendix), set out at Volume 43, No. 250 Federal Register at pp. 60772-60783.

2/ If the Commission were to find that the answers to these questions are yes and no, respectively, the Association would seek to raise additional issues including whether the Association's latest proposal is in excess of the pay standard and whether the dispute herein is moot because both parties' latest proposals in bargaining are both either within or in excess of the pay standard. The District would dispute the Association's contentions in this regard and challenge the Commission's jurisdiction to determine these issues.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and enters the following

DECLARATORY RULING

The District has an obligation to bargain collectively concerning the economic proposals of the Association despite the fact that such proposals may be in excess of the pay standard of the United States Council on Wage and Price Stability set out at 6 Code of Federal Regulations 705B.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
Gary L. Covelli, Commissioner

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

As noted in the Findings there are two issues presented here for determination: (1) Whether the pay standard applies to the District and (2) Whether a proposal in excess of the pay standard is a mandatory subject of bargaining.

POSITION OF THE DISTRICT:

In its brief, the District acknowledges that it currently accepts only a small amount of federal funds but argues that the pay standard nevertheless applies to the District, which is a local governmental entity, because:

1. Under 6 Code of Federal Regulations 705 B-1 the pay standard applies to each "employee unit".
2. Under 6 Code of Federal Regulations 705 B-2 an "employee unit" is a group of employees of a "Company".
3. Under 6 Code of Federal Regulations 705 D a "Company" is defined to include "local government entities".

With regard to its contention that the pay standard is a prohibited or at most a permissive subject of bargaining, the District argues:

1. Even though compliance with the pay standard is voluntary, the intent of the regulation is to impose a deep sense of responsibility on each employer as noted in the executive order on which it is based (E.O. 12092, 43 Federal Register 51375).
2. Employers that do not comply may be subjected to public identification under the procedures established at 6 Code of Federal Regulations 706.50 et. seq.
3. Local public officials have a special responsibility to provide moral leadership in support of national policies.
4. Since the District does not have the freedom under the Municipal Employment Relations Act to make the final decision as to whether to accept or reject an Association proposal in bargaining, the situation here is distinguishable from that which exists under the National Labor Relations Act and the Wisconsin Employment Peace Act.
5. The only public safeguard against the compelled imposition of a final offer in excess of the pay standard is the provision that final offers may include only mandatory subjects of bargaining. (Section 111.70(4)(cm)6.a., Wis. Stats.)
6. If a Municipal Employer cannot object to an economic proposal in excess of the pay standard, it cannot exercise its responsibilities under the guidelines.
7. If the Commission, which is also a government instrumentality, finds that an economic proposal in excess of the pay standard is a mandatory subject

of bargaining, it will fail to meet its responsibility to support national policy and provide a signal to interest arbitrators that the State of Wisconsin does not support the federal government's efforts to control inflation.

By way of summary, the District argues that a ruling that a demand in excess of the pay standard is a prohibited subject of bargaining would establish a state-wide policy in support of the federal government's fight against inflation. On the other hand, a ruling that such a demand is a permissive subject would at least leave the responsibility to each Municipal Employer. According to the District, the Commission is thus presented with a choice as to whether to fix the political responsibility at the state or local level. However, holding such a proposal to be a mandatory subject of bargaining would be to "surrender the political responsibility at both levels to the compulsion of the arbitration process."

POSITION OF THE ASSOCIATION:

In its brief the Association does not specifically contend that the pay standard is not applicable to the District. Instead, it argues that the Commission should find that the Council has not created any provision for monitoring Municipal Employers such as the District and that it has no sanctions available to use against the District. In this regard it argues that:

1. The only sanctions available for the enforcement of the pay standard are publication of names and requiring certification of compliance in order to qualify to bid on federal contracts in excess of five million dollars.
2. The District is not bidding on any five million dollar government contracts and federal grants-in-aid are not considered contracts for this purpose.
3. The Director of the Council on Wage and Price Stability has publically admitted that the pay standard is voluntary by conceding that enforcement of the pay standard through the withholding of grants would require legislation.
4. The District will not even be monitored by the Council since the Council only monitors agreements covering bargaining units in excess of 1000 employees and does not require reporting except by governmental entities that employ in excess of 5000 employees.

With regard to its contention that the pay standard is a mandatory subject of bargaining, the Association argues:

1. Wages are a mandatory subject of bargaining under both federal and Wisconsin law.
2. While there have been no federal cases under the National Labor Relations Act involving the voluntary pay standard the cases which arose under the mandatory wage controls in effect between August 1971 and November 1973 reflect that wages remain a mandatory subject of bargaining even when subjected to legislative controls.
3. It is not illegal to fail to comply with the voluntary pay standard and therefore a proposal in excess of the pay standard is not a prohibited subject.

4. Since permissive proposals are those which are not illegal and yet do not fall within the category of "wages, hours and working conditions" a proposal in excess of the voluntary pay standard is perforce not a permissive subject of bargaining.
5. A finding that a proposal in excess of the pay standard is a prohibited or permissive subject of bargaining would stifle collective bargaining since the collective bargaining process ordinarily involves the making of initial proposals much more favorable to one's position than the particular party expects to achieve as the result of bargaining.
6. The pay standard will, in all likelihood, be complied with under the provisions of the Municipal Employment Relations Act since an Arbitrator will consider whether the offers comply with the pay standard in determining which offer is more reasonable and will look more favorably upon a Union proposal that has been reduced through collective bargaining to bring it within the pay standard.
7. The pay standard is not only voluntary but has been subject to modification as required by developments in the collective bargaining process.

DISCUSSION:

(1) Application of the Pay Standard

As noted in the District's brief, the regulations in question leave no doubt that they apply to all local governmental entities, including the District. The fact that the District receives only a small amount of federal funds and is not subject to any automatic reporting requirements or otherwise monitored by the Council is immaterial. Furthermore, the alleged lack of any meaningful sanctions, while relevant to the question of whether the program should be viewed as "voluntary" or not, is likewise immaterial. The regulation on its face applies to all "employee units" of local governmental entities such as the District. The bargaining unit in question is an "employee unit" within the meaning of 6 Code of Federal Regulations 705 B-2(a) and therefore subject to the pay standard provisions. This is true regardless of whether the Council has an effective means to detect or sanction non-conformity in general or on the particular facts in this case. 3/

(2) Duty To Bargain

It is undisputed that the pay standard is voluntary in the sense that non-compliance does not constitute a violation of law. For this reason it is difficult to comprehend the District's apparent

3/ We are aware of the decision of the United States District Court for the District of Columbia in the case of AMERICAN FEDERATION OF LABOR v. KAHN, Case No. 79-802, 472 Law Week 2765, wherein the Court concluded that without enabling legislation the pay standard may not be constitutionally enforced through the withholding of government contracts. It is also our understanding that the decision in that case has been appealed.

belief that the Commission has the authority to declare that a proposal 4/ in excess of the pay standard is prohibited. The issue here is not whether the Commission supports federal policy with regard to controlling inflation. In effect the District would have the Commission convert a voluntary federal program into a mandatory state program at least insofar as it would apply to employees covered by the Municipal Employment Relations Act. We find no legislative basis for our entering such a ruling. Our authority under Section 111.70(4)(b) and 111.70(4)(cm)6.g., Wis. Stats., is to determine, subject to court review, whether a particular proposal in bargaining is a mandatory, permissive or prohibited subject of bargaining and does not include the authority to label as "prohibited" a proposal that is not contrary to law.

We now turn to the question of whether a proposal in excess of the pay standard is a permissive rather than a mandatory subject of bargaining. As the Union correctly points out in its brief, unless the existence of the federal regulation somehow changes the nature of such a proposal, it clearly relates to wages which are indisputably mandatory subjects of bargaining.

The District cites no legal authority which would support its contention that such a proposal is a permissive subject of bargaining. Rather, it relies on a number of policy arguments to support its position as to the alleged beneficial consequences of such a ruling. Without attempting to demean or otherwise discredit those arguments, we believe that they are misdirected. The legislature has delegated the authority for determining the appropriate level of pay increases to the District, acting through its elected Board. That authority is subject to the duty to bargain in good faith and certain other requirements of law. One of those requirements is that the District engage in collective bargaining in a good faith effort to reach agreement. Another of those requirements is that if the parties are unable to achieve a voluntary agreement on the appropriate pay increases, either party has the right to submit the dispute to the final and binding decision of a mediator-arbitrator appointed by the Commission who is subject to legislatively mandated criteria. 5/ In collective bargaining,

4/ For purposes of the discussion herein, we make no distinction between an initial proposal in bargaining or a "final" proposal. While we agree with the Association as a practical matter initial Union proposals are in excess of what the Union hopes to achieve, that fact does not alter the character of the proposal.

5/ Those criteria clearly encompass arguments concerning the appropriate role of a pay standard in determining which offer should be selected. The mediator-arbitrator acting as arbitrator is required by Section 111.70(4)(cm)7, Wis. Stats., to consider inter alia:

"a. The lawful authority of the municipal employer.

. . .

"c. The interests and welfare of the public. . .

. . .

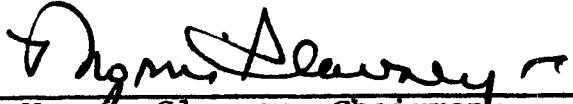
"h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, factfinding, arbitration or otherwise in the public service or in private employment."

See also Elkouri & Elkouri, How Arbitration Works (BNA 1973) at pp. 793-794.


the choice of whether and under what circumstances the pay standard should or should not be exceeded is thus left to the collective bargaining process and ultimately the mediator-arbitrator. For the Commission to find that a proposal may not exceed voluntary pay standards under the guise of labeling it a permissive subject of bargaining would in our view be contrary to the intent of the legislated bargaining and impasse procedure.

Dated at Madison, Wisconsin this 22nd day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner